Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

THE CITY AND COUNTY OF DENVER, COLORADO,

Petitioner,

v.

CONCRETE WORKS OF COLORADO, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Tenth Circuit erred in holding that there were genuine issues of material fact precluding the entry of summary judgment in favor of Petitioner.

2. Whether the existence of a compelling governmental interest sufficient to support a remedial affirmative action program is a question of law properly decided on motion for summary judgment.

3. Whether a court may substitute its judgment for that of a legislative body and "weigh" competing inferences as to the existence of past discrimination in determining whether a municipality has established a strong basis in evidence for its belief that remedial action is warranted.

4. Whether Petitioner was entitled to summary judgment on the gender portion of the Ordinance.

5. Whether statistical disparities in the relevant statistical pool may be based on "availability" rather than "capacity".

6. Whether, in establishing a strong basis in evidence, a municipality must establish a "linkage" between a municipality's award of public contracts and evidence of industry-wide discrimination.

7. Whether Respondent has standing for an equal protection challenge to the Ordinance.

8. Whether the Ordinance creates a racial classification mandating the application of strict scrutiny.

LIST OF PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed appear in the caption of this case. Petitioner is a municipal corporation, and has no parent or subsidiary companies.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (hereinafter "Court of Appeals"), *Concrete Works of Colo. v. City and County of Denver*, 36 F.3d 1513 (10th Cir. 1994), appears at pages App. 1 to App. 43 of the Appendix. The judgment of the United States District Court for the District of Colorado (the "District Court"), *Concrete Works of Colo. v. City and County of Denver*, 823 F. Supp. 821 (D. Colo. 1993), appears at pages App. 44 to App. 102 of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on September 23, 1994. Both a petition for rehearing and a motion for reconsideration were denied on October 17, 1994. No extension of time within which to file the petition for a writ of certiorari has been sought or granted. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

Denver Ordinance No. 513, Series of 1990, enacted on September 4, 1990, as amended, is set forth at pages App. 103 to App. 161, codified in Denver Revised Municipal Code ("Den. Rev. Mun. Code") Chapter 28, art. III, division III.

The Fourteenth Amendment to the United States Constitution is set forth at App. 162.

42 U.S.C. § 1981 is set forth at App. 163.

42 U.S.C. § 1983 is set forth at App. 164.

Colorado Constitution Sections 25 and 29 are set forth at App. 165 and App. 166.

Denver, Colo., Charter ch. A, art. II, § A2.3-1(1) (1982), is set forth at App. 167.

STATEMENT OF THE CASE

Nature of the Controversy

This case involves a constitutional challenge to Denver Ordinance No. 513, Series of 1990, entitled "Nondiscrimination in City Contracting" (the "Ordinance"), designed to encourage nondiscrimination in the awarding of construction subcontracts for Denver-funded public works projects. App. 105-106.

Respondent is a non-minority male-owned Colorado corporation engaged in the construction business as a prime contractor. Respondent's challenge is predicated on 42 U.S.C. §§ 1981 and 1983, Colorado Constitution Sections 25 and 29, and the equal protection clause of the Fourteenth Amendment to the United States Constitution. Federal jurisdiction in the District Court was based on 28 U.S.C. §§ 1331 and 1343(3) and (4).

The Ordinance

On September 4, 1990, the Denver City Council enacted the Ordinance after compiling an exhaustive collection of particularized and geographically targeted evidence of past discrimination against minority- and woman-owned businesses (hereinafter "MBEs", "WBEs" or "W/MBEs") both by Petitioner and in the local construction industry. Notwithstanding this persuasive evidence, Petitioner rejected race-conscious remedies such as quotas and bid preferences. Rather, Petitioner opted only to prevent future discrimination by requiring that all prime contractors show evidence of nondiscrimination in the letting of subcontracts on Denver construction projects. As the District Court found, the Ordinance provides a "flexible, aspirational goals" program (App. 90) in which the lowest bidder on relevant Denver projects will be awarded the contract if (1) it meets the goals, if any, assigned to the project regarding the use of eligible, certified minority- and woman-owned businesses, or (2) it shows that good faith efforts were made to solicit diverse participation even if the goals are not met.

The Ordinance provides for annual construction dollar goals of 16% for MBEs and 12% for WBEs. App. 125-126. Under Section 28-56, goals for MBE and WBE participation are to be set on a project-by-project basis depending on their availability and capacity with respect to each project. App. 127-130. No particular goal is required to be set for each project, and goals of 0% MBE and 0% WBE participation have been set for many projects. In 1991, for example, 18 of 75 construction projects awarded had 0% MBE and 0% WBE goals assigned. App.

49. Thus, the annual goal is merely a statement of aspiration wholly without operational significance.

Once goals are set on a project, all bidders, including MBEs, WBEs and non-certified minority and woman-owned businesses, are required to either meet the project goals or show good faith efforts to solicit diverse participation. Section 28-58 sets forth the requirements for demonstrating good faith efforts on construction projects. App. 131-135. These requirements are designed to give MBEs and WBEs full access to the bidding process at the subcontracting level, and to ensure nondiscrimination by prime contractors, but do not require the acceptance of noncompetitive bids. Of critical importance is that in making a good faith effort to meet the project goals, a bidder is not required to use an MBE or WBE as a subcontractor if the MBE or WBE did not submit the lowest bid or was otherwise not qualified. App. 134-135.

The Ordinance does not create quotas, set-asides or bid preferences.[1] Indeed, such measures are barred by the Denver Charter, which requires that all public works contracts "shall be let to the lowest, responsive, qualified

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[1] Neither the annual goals nor the project goals operate as set-asides or quotas. In 1990, for example, goals were met on only 16 of the 48 construction contracts awarded (33%). In 1991, the first full year under the Ordinance, goals were met on only 47 of 75 contracts awarded. Overall, only 12.4% MBE utilization and 5.9% WBE utilization was attained on Denver construction projects in 1991, in spite of annual goals of 16% and 12%, respectively. App. 49-50.

bidder"; and that "any other mode of letting such contracts shall be illegal and void."[2] Denver contracts are awarded to the lowest responsive bidder, regardless of race. No one, either as a prime contractor or subcontractor, is denied the opportunity to compete for any contract based upon race, ethnicity or gender, and the bids of the W/MBEs receive no preference over other bids. The Ordinance provides all bidders with a presumption of nondiscrimination where goals have been met. Where goals are not met, it provides all bidders an alternate method of showing nondiscrimination through good faith efforts. Thus, a bidder gets no advantage or disadvantage from meeting or not meeting the project goals, if any, and the Ordinance provides no incentive to a bidder to use W/MBEs if they are inferior in cost or ability. The Ordinance requires only a level playing field for bidding on Denver projects. Other than intentional discrimination, no legitimate rationale has been articulated for allowing Denver prime contractors to reject W/MBEs as subcontractors if they submit the lowest bid and are otherwise qualified.

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[2] App. 167. There is no conflict between Petitioner's subcontractor outreach program and competitive bidding. Indeed, "in mandating reasonable good faith outreach to all types of subcontractor enterprises, the program in effect seeks to guard against favoritism and improvidence by prime contractors, and to increase opportunity and participation within the competitive bidding process." *Domar Elec. v. City of Los Angeles*, No. S036526, 1994 Cal. LEXIS 6581, at *21 (Cal. Dec. 28, 1994).

History of Proceedings

Respondent's Complaint, filed on January 6, 1992, set forth six claims for relief, and sought a judgment declaring the Ordinance unconstitutional and enjoining Petitioner from enforcing it. Respondent alleged that the Ordinance constitutes an unconstitutional race- and gender-based "quota" or "preference." It also sought monetary damages for Petitioner's rejection of Respondent's bids on three separate projects. All of the claims are coextensive with the protection offered by the equal protection clause of the Fourteenth Amendment. Thus, the dispositive issue raised by Respondent's claims is whether the Ordinance deprived Respondent of equal protection.

On September 29, 1992, after extensive discovery had been conducted by both parties and the deadline for completing discovery had passed, Petitioner filed a Motion for Summary Judgment together with numerous exhibits, alleging that it was entitled to judgment as a matter of law. On February 26, 1993, the District Court entered summary judgment in favor of Petitioner. Although the District Court ultimately ruled that Respondent has standing, it characterized Respondent's showing as "extraordinarily weak." In determining that Petitioner was entitled to judgment as a matter of law, the District Court applied the "strict scrutiny" standard of review for race-conscious affirmative action legislation set forth in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) [hereinafter *"Croson"*].

In applying strict scrutiny, the District Court concluded that Petitioner demonstrated a strong basis in

evidence and reasonably relied upon a potent combination of statistical and anecdotal evidence, including a compilation of federal studies, anecdotal responses, independent analyses, city council hearings, census data and statistical evidence. Thus, the District Court found that "Denver had an adequate factual predicate" for concluding that remedial action was necessary, satisfying the first prong of strict scrutiny. App. 88.

The District Court then found the Ordinance to be narrowly tailored, stating that "Examples of waiver and alternative routes of compliance in the Ordinance read like a how-to manual on narrowly tailored aspirational goals ordinances," (App. 95) and "We are satisfied that the Ordinance is narrowly tailored; indeed, if it were not, then we have grave doubts about whether *any* ordinance could pass scrutiny under so exceptionally strict a standard."[3] App. 98.

Respondent filed its appeal in the Court of Appeals on March 23, 1993. On September 23, 1994, the Court of Appeals reversed and remanded for trial.

The Court of Appeals found that Respondent has standing, and applied strict scrutiny to the Ordinance. While holding that Respondent has the burden of proof, that whether a strong basis in evidence exists is a question of law, that Petitioner need not *prove* prior discrimination, that Petitioner produced sufficient evidence from

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[3] Respondent did not preserve on appeal the District Court's finding that the Ordinance is narrowly tailored. Thus, this issue was not addressed by the Court of Appeals.

which an inference of past discrimination could reasonably be drawn, and that in the face of a properly supported motion for summary judgment, the nonmoving party may not rest solely on its allegations, the Court of Appeals nonetheless reversed the District Court's entry of summary judgment and remanded this matter for trial.

The Court of Appeals characterized Respondent's evidence of past discrimination as follows: "Denver offers persuasive pieces of evidence" (App. 23); "uncontested . . . evidence to support Denver's showing of discrimination" (App. 25); adequate to "support Denver's contention that race and gender discrimination existed" (App. 27); "strong evidence of underutilization of MBEs and WBEs" (App. 27); "Denver's data indicates significant WBE underutilization such that the Ordinance's gender classification arises from 'reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions' " (App. 31-32, fn. 9); "data reflecting distinct MBE and WBE underutilization" (App. 33); "persuasive evidence of underlying discrimination in the Denver construction market" (App. 34); "this 1989 data further supports the inference" of underutilization of MBEs and WBEs (App. 34); "the record on summary judgment contains . . . data . . . that gives rise to an inference of discrimination" (App. 35); "pre-enactment evidence of the overall Denver MSA construction market . . . gives rise to an inference that local prime contractors discriminated" (App. 38); and "Standing in marked contrast to the predicate facts on which Richmond unsuccessfully relied in *Croson*, Denver's evidence of discrimination both in the award of public contracts and within

the overall Denver MSA is particularized and geographically targeted" (App. 41).

Notwithstanding its ruling that the adequacy of Petitioner's evidence is a question of law, and notwithstanding the foregoing evidentiary findings, the Court of Appeals remanded for trial (i) to permit the parties "to develop a factual record to support their competing interpretations of the empirical data" (App. 42); (ii) to resolve "disputes about the accuracy of Denver's data" (App. 36); (iii) to consider Respondent's "competing interpretation" of Petitioner's empirical data (App. 42); and (iv) to resolve the "factual dispute" created by Respondent's assertion of its "hypothesis" that the "capacity" of W/MBEs was less than their "availability" (App. 36-37).

REASONS FOR GRANTING THE WRIT

I. Reversal Of Summary Judgment Was In Violation Of Controlling Supreme Court Precedent And Contrary To Decisions Of Other Courts Of Appeals

A. The Substantive Law Required The Entry Of Summary Judgment In Favor Of Petitioner

1. The Applicable Substantive Law

The Court of Appeals' reversal of the District Court's entry of summary judgment for Petitioner and its remand of this matter for trial is in direct conflict with applicable decisions of this Court. While this Court has not directly addressed the interplay of established summary judgment principles in the context of a local affirmative action program, even a cursory review of such principles and

the applicable substantive law lays bare the conflict between the Court of Appeals' decision and controlling decisions of this Court. By requiring the District Court to choose between competing inferences, the Court of Appeals held, despite its statements to the contrary, that a strong basis in evidence is insufficient to establish a compelling governmental interest. Rather, it required that before a municipality's affirmative action program will be upheld, a municipality must *prove* actual past discrimination. This result is in direct and irreconcilable conflict with *Croson* and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, *reh'g denied*, 478 U.S. 1014 (1986), as well as the Sixth Circuit's decision in *Aiken v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994).

Croson enunciated the evidentiary predicate necessary to support a local, remedial affirmative action program. Strict scrutiny requires a determination of whether Petitioner had a "strong basis in evidence for its conclusion that remedial action was necessary." *Croson*, 488 U.S. at 500; *Associated Gen. Contractors of Cal. v. Coalition for Economic Equity*, 950 F.2d 1401, 1413 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1670 (1992). A strong basis in evidence is satisfied by evidence "approaching a prima facie case" of discrimination either by the municipality *or* in the local construction industry. *Croson*, 488 U.S. at 500; *see also Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir.), *cert. denied*, 498 U.S. 983 (1990).[4] As the Sixth Circuit

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[4] The Court of Appeals requested, on remand, an explanation of "whether there is any linkage between Denver's award of public contracts and Denver's MSA evidence of industry-wide discrimination." App. 39. Petitioner presented uncontroverted evidence of *both* its own discrimination and of private

recently stated, "Such prima facie proof (of discrimination) presents a strong basis in evidence to support a finding of a compelling governmental interest." *Aiken*, 37 F.3d at 1163 (citations omitted).

Whether a prima facie case has been established is a purely legal determination routinely made by courts. Such a showing requires only that degree of evidence which would allow a reasonable trier of fact to return a verdict for the nonmoving party. *Wygant*, 476 U.S. at 277-78. To meet its burden of producing evidence "approaching a prima facie case," Petitioner need only produce nearly enough evidence from which a rational trier of fact could conclude the presence of discrimination.

Under *Croson*, once a municipality produces evidence upon which an inference of discrimination can reasonably be drawn, it establishes a strong basis in evidence for remedial action. *Croson*, 488 U.S. at 509; *see also Wygant*, 476 U.S. at 293 (O'Connor, J., concurring). Conversely, a challenger prevails by proving that the evidence could not reasonably support such an inference. *Wygant*, 476

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discrimination in the local construction industry in which it participates. There is no legal basis for requiring this amorphous "linkage" between identified private discrimination and Petitioner's award of public contracts, and whether such a linkage is required is a question of law, not of fact. In any event, it is difficult to conceive how Petitioner could be excluded as a passive participant from the marketplace in which it actively participates and from which it draws more than 80 percent of its contractors. App. 74-75. This added requirement is in direct conflict with *Croson*, which establishes that a municipality may remedy public *or* private discrimination.

U.S. at 293 (O'Connor, J., concurring); *see also Aiken*, 37 F.3d at 1163.

While enunciating the factual predicate necessary for the enactment of a benign racial classification, *Croson* did not reallocate the procedural burden of persuasion present in reverse discrimination cases. As Justice O'Connor stated in *Wygant*:

> In 'reverse discrimination' suits, as in any other suit, *it is the plaintiffs who must bear the burden of demonstrating that their rights have been violated.* The findings a court must make before upholding an affirmative action plan reflect this allocation of proof and the nature of the challenge asserted. For instance, in the example posed above, the nonminority teachers could easily demonstrate that the purpose and effect of the plan is to impose a race-based classification. But when the Board introduces its statistical proof as evidence of its remedial purpose, thereby supplying the court with the means for determining that the Board had a firm basis for concluding that remedial action was appropriate, *it is incumbent upon the nonminority teachers to prove their case; they continue to bear the ultimate burden of persuading the court that the Board's evidence did not support an inference of discrimination and thus a remedial purpose,* or that the plan instituted on the basis of this evidence was not sufficiently 'narrowly tailored'. . . .

476 U.S. at 292-93 (emphasis added). Justice Powell's plurality opinion was equally precise on this issue: "The

ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative action program. . . . " *Wygant*, 476 U.S. at 277-78. *See also Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616, 626 (1987) (in both Title VII and constitutional affirmative action litigation, plaintiff bears the burden of persuasion).

Strict scrutiny does not, therefore, require a reviewing court to determine whether a municipality has *proven* discrimination or negated all evidence of nondiscrimination, and the court is not called upon to make a finding of actual prior discrimination.[5] It is not called upon to substitute its judgment for that of the legislative body, but rather to determine whether the municipality's evidence could, as a matter of law, reasonably support the inference of past discrimination drawn by the municipality. Strict scrutiny does not require a reviewing court to determine whether it agrees with the inference drawn, whether competing inferences may be drawn, or whether it would, in weighing the evidence, choose differently among the competing inferences. This analysis is not only required by *Croson* and *Wygant*, but is consistent with burden-allocation in affirmative action case law,[6] and with the deferential, albeit not blind, review to be

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[5] *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring) ("[N]or does it mean that the court must make an actual finding of prior discrimination based on the employer's proof before the employer's affirmative action plan will be upheld."); *Associated Gen. Contractors of Cal. v. City and County of San Francisco*, 748 F. Supp. 1443, 1449 (N.D. Cal. 1990), *aff'd sub nom., Associated Gen. Contractors of Cal. v. Coalition for Economic Equity*, 950 F. 2d 1401 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1670 (1992).

[6] *See also Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

given to actions taken by legislative bodies.[7] Racial classifications in affirmative action plans are subject to strict scrutiny, but not, however, to scrutiny that is "strict in theory, but fatal in fact."[8]

2. Interplay Between The Substantive Law And Summary Judgment Standards

Summary judgment is appropriate where there is no genuine issue of material fact, entitling the moving party to judgment as a matter of law.[9] The mere existence of a factual dispute will not defeat a properly supported motion for summary judgment. *Anderson v. Liberty Lobby,*

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[7] Legislative bodies are entitled to a presumption of regularity and deferential review by the judiciary. *See Fullilove v. Klutznick,* 448 U.S. 448 (1980). In the arena of strict scrutiny, however, the judiciary may not give blind judicial deference to legislative or executive pronouncements that racial classifications are necessary. This does not mean, however, that the legislative finding is not entitled to deferential review, but only that it is not entitled to *blind* review.

[8] *Regents of the Univ. of Cal. v. Bakke,* 438 U.S. 265, 364 (1978) (opinion of Brennan, White, Marshall and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

[9] Both the District Court and the Court of Appeals agreed that whether Petitioner's evidence is adequate to justify its conclusion that remedial action was warranted is a question of law, not of fact. App. 62 and App. 20, respectively. *See also Associated Gen. Contractors of Conn. v. City of New Haven,* 791 F. Supp. 941, 944 (D. Conn. 1992), *vacated,* No. 94-7316, 1994 U.S. App. LEXIS 33318 (2d Cir. Nov. 23, 1994). As the Ninth Circuit recently stated, "It is difficult to think of a question that involves a more purely 'legal' matter than the question of a given plan's constitutionality." *Cerrato v. San Francisco Community College Dist.,* 26 F.3d 968, 974 (9th Cir. 1994).

Inc., 477 U.S. 242, 247-48 (1986). Rather, the factual dispute must be material to a genuine issue for trial; disputes as to facts that are immaterial or irrelevant to a genuine issue for trial will not be "counted" at the summary judgment stage. *Anderson*, 477 U.S. at 248. The applicable substantive law identifies those facts which are material, and whether a dispute about such facts presents a genuine issue for trial. *Anderson*, 477 U.S. at 248; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

As to materiality, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. A genuine issue for trial is presented only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248.

In ruling on a motion for summary judgment, the evidence must be viewed through the prism of the substantive law. *Anderson*, 477 U.S. at 254. The substantive law determines not only materiality and genuineness, but also whether the presence of competing inferences drawn from the evidence will properly preclude the entry of summary judgment. *See Matsushita*, 475 U.S. at 587-88. Thus, in *Matsushita* the substantive law required the nonmoving party to present more than an "equally plausible" competing inference. *Matsushita*, 475 U.S. at 596-97. To survive summary judgment, it had to present evidence tending to exclude the possibility of the inference drawn by the moving party, thereby allowing a reasonable trier of fact to return a verdict in favor of the nonmoving party. *Matsushita*, 475 U.S. at 588. Here, Respondent bore

the same burden. Under the applicable substantive law, it was not enough for Respondent to present a "competing interpretation" or "hypothesis", or "potential flaws" in Petitioner's evidence. To avoid summary judgment, Respondent had to negate the inference drawn by Petitioner by showing that, as a matter of law, the evidence could not reasonably support the inference of prior discrimination.

The wisdom of the foregoing analysis is best illustrated by examining the consequences of ignoring it. By looking at Petitioner's evidence in a vacuum, the Court of Appeals remanded for trial and ordered the District Court to weigh the evidence, despite finding that Respondent failed to negate Petitioner's inference. By so ordering, the Court of Appeals, contrary to its own holding that Respondent had the burden of proof, shifted the burden of proof to Petitioner. If the District Court must weigh the evidence, then it must determine whether it believes Petitioner's admittedly reasonable inference or Respondent's competing inference. If Petitioner's inference must outweigh a competing inference, then Petitioner is being required to *prove* its inference.[10] Thus, weighing the evidence results in an impermissible *de novo* review to determine whether actual discrimination can be

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[10] See App. 86 where the District Court stated: "It appears from Concrete Works' critiques of Denver's interpretation of the statistics and anecdotal evidence that Concrete Works would require a municipality affirmatively to *prove* discrimination with such a degree of statistical certainty that no statistician could disagree. We do not believe that *Croson* requires such an onerous, perhaps impossible, burden of proof." Yet, this is exactly what the Court of Appeals would require of Petitioner.

proven rather than whether Petitioner had a "strong basis in evidence" for believing that remedial action was warranted. This is in direct conflict with this Court's holdings in *Croson* and *Wygant* and the Sixth Circuit's decision in *Aiken*.

B. Conclusory Allegations Are Insufficient To Defeat A Properly Supported Motion For Summary Judgment

In *Anderson*, this Court held that summary judgment should be granted if the pretrial evidence is merely colorable or is not significantly probative. *Anderson*, 477 U.S. at 249-250. It is indisputable that hypotheses, conclusory allegations, conjecture and mere speculation cannot establish an issue of fact sufficient to defeat a motion for summary judgment. *See, e.g., McVay v. Western Plains Service Corp.*, 823 F.2d 1395, 1398 (10th Cir. 1987); *R-G Denver, Ltd. v. First City Holdings, Inc.*, 789 F.2d 1469, 1471 (10th Cir. 1986); *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1221-22 (5th Cir. 1985); *Hall v. Printing and Graphic Arts Union, Local No. 3*, 696 F.2d 494, 500 (7th Cir. 1982); *see also Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888 (1990); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *Anderson*, 477 U.S. at 256. Yet, the Court of Appeals remanded for trial on the basis of nothing more than "potential flaws" in a limited portion of Petitioner's data, to permit the parties "to develop a factual record to support their competing interpretations of the empirical data." Those "potential flaws", however, are insufficient as a matter of law to rebut the inference drawn by Petitioner from the empirical data. In any event, the question

of which inferences may be drawn from the evidence is a question of law, not a question of fact.

Despite the overwhelming evidence supporting Petitioner's inference, the Court of Appeals held that Respondent's "competing interpretation" of a limited portion of Petitioner's data, for one City agency (Department of Public Works) for a period of time when affirmative action programs tainted such data, created a genuine issue of material fact. Yet Respondent failed to introduce *any* evidence contradicting Petitioner's evidence that such data was statistically unreliable because of the "taint" of existing programs. Additionally, Respondent failed to present *any* data rebutting Petitioner's evidence of discrimination in the other city agency responsible for construction, which evidence was untainted by the existence of any formal program, and failed to present *any* evidence rebutting Petitioner's evidence of discrimination in the local marketplace.[11]

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[11] Significantly, while ordering the District Court to "weigh the evidence," the Court of Appeals, like Respondent, ignored that Respondent failed to submit *any* statistical data in this case. This alone was fatal to Respondent. To have met its burden, Respondent must have conducted its own regression analysis and shown that if Petitioner's statistical evidence was in fact flawed, correcting for the flaws would have resulted in no disparities. *See, e.g., United Black Fire Fighters Ass'n v. City of Akron*, 976 F.2d 999, 1011 (6th Cir. 1992); *E.E.O.C. v. General Tel. Co. of Northwest*, 885 F.2d 575, 579-80 (9th Cir. 1989), *cert. denied*, 498 U.S. 950 (1990); *Allen v. Seidman*, 881 F.2d 375, 378-79 (7th Cir. 1989); *Sobel v. Yeshiva Univ.*, 839 F.2d 18, 34 (2d Cir. 1988), *cert. denied*, 490 U.S. 1105 (1989); *Catlett v. Missouri Highway and Transp. Comm'n*, 828 F.2d 1260, 1266 (8th Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988); *Palmer v. Schultz*, 815 F.2d 84, 101 (D.C. Cir. 1987); *Segar v. Smith*, 738 F.2d 1249, 1287 (D.C. Cir. 1984), *cert.*

In addition, Respondent's unsupported hypothesis that "capacity" was less than "availability" led the Court of Appeals to order that capacity be considered as a factor "once credible information about the size or capacity of the firms is introduced in the record. . . . " App. 37. In so doing, the Court of Appeals acknowledged the absence in the record of any credible information supporting Respondent's "capacity" theory. Respondent's failure to present any data supporting its capacity hypothesis demonstrates that, under any circumstances, this matter is ripe for summary judgment. The Court of Appeals followed Respondent down the slippery slope of conjecture by "hypothesizing" (App. 36, fn. 22), without *any* supporting evidence, that a disparity index calculated with availability may show greater underutilization than one calculated with capacity. Respondent's and the Court of Appeals' unsupported and insupportable hypotheses

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denied, 471 U.S. 1115 (1985). Respondent produced not a scintilla of empirical data to negate Petitioner's inference, but instead relied upon unsupported (and insupportable) "hypotheses," "potential flaws" and "competing interpretations" to create alleged genuine issues of material fact. As the Court of Appeals acknowledged, uncontested data will support an inference notwithstanding conclusory allegations to the contrary; unsupported conclusory allegations do not create genuine issues of material fact. Summary judgment simply cannot be avoided on the basis of a bare hope that Respondent can develop at trial a factual record to support their competing interpretations of the empirical data. *See, e.g., Celotex*, 477 U.S. at 324-25; *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 289-290, *reh'g denied*, 393 U.S. 901 (1968). The Court of Appeals' decision is thus in direct and irreconcilable conflict with the foregoing decisions of other courts of appeals.

are inadequate as a matter of law to create a genuine issue of material fact.[12]

C. The Court Of Appeals Erroneously Found That Respondent Had Standing

Citing this Court's decision in *Northeastern Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville*, 113 S. Ct. 2297 (1993), the Court of Appeals held that Respondent has standing because the extra "costs and burdens on nonminority firms" allegedly imposed by the Ordinance prevented Respondent "from competing with MBEs and WBEs on an equal basis."[13] *Jacksonville* is inapposite, however, because there, unlike the instant case, the ordinance in question required that 10 percent of the amount spent on city contracts be set

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[12] In any event, evidence of discrimination sufficient to establish a compelling governmental interest may, as a matter of law, be premised upon a statistical disparity utilizing availability rather than capacity, and no case holds to the contrary. *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977) (approving similar use of U.S. census data for the relevant statistical pool where "qualifications" were at issue); *Aiken*, 37 F.3d at 1163 (disparity based on "availability" in the "relevant statistical pool" gives rise to an inference which constitutes prima facie proof sufficient to support a finding of a compelling governmental interest). As the Sixth Circuit stated in *Aiken*, "since . . . plaintiffs have not rebutted the inferences that arise from these statistics, . . . no genuine issue remains. . . ." *Aiken*, 37 F.3d at 1163.

[13] App. 11. The record is clear, however, that there is no material difference in the administrative burden, including costs, incurred under the Ordinance in showing good faith, whether the contractor is an MBE, WBE, white male or a non-certified woman or minority contractor. App. 169.

aside for minority firms. In *Jacksonville*, minority businesses were given an advantage in the bidding process and non-minorities were precluded from competing for contracts based solely on race.

Here, there was no quota or bid preference and Respondent failed to show that it was denied "equal treatment" or to identify any cognizable injury under the Fourteenth Amendment. Respondent's three bids were rejected not because of any racial preference given to W/MBE prime contractors, but because Respondent failed to be responsive to the universally applicable bid requirement that it make good faith efforts to provide opportunity to W/MBE subcontractors to bid.[14] Under Petitioner's Charter and Section 28-57 (App. 167 and App. 130-131, respectively), contracts are awarded to the

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[14] Of the three contracts at issue, two were awarded to nonminority male-owned businesses. App. 53-54. Under any scenario, Petitioner is entitled to summary judgment with respect to those two contracts because the nonminority male businesses who obtained the contracts did not do so because of any conceivable racial preference. The sole instance cited by Respondent of an alleged injury resulting from an alleged racial preference was on the 6th & Josephine project. There, Respondent's bid was rejected not because of any racial preference given to the second low bidder, but because Respondent failed to show good faith efforts. Had the second low bidder been a white male-owned firm that showed nondiscrimination, it would have been awarded the contract. This is best illustrated by Project No. 85-112A, where Respondent was awarded, *on the basis of good faith*, the contract as the second low bidder because the low bidder failed to comply with the Ordinance. App. 54. This obviously conferred no racial "preference" to Respondent.

lowest responsive bidder, and to be responsive, *all* bidders, without regard to race or gender, must meet project goals or show good faith efforts to do so.

Under the Ordinance, a non-minority male firm, like all other firms, is required to show nothing other than nondiscrimination in the bidding process, and suffers no competitive disadvantage vis a vis W/MBE prime contractors. The burden of complying with the universally applicable standards of the Ordinance is simply not race- or gender-based, and constitutes insufficient injury to confer standing on an equal protection claim.[15]

D. The Court Of Appeals Erroneously Applied Strict Scrutiny To The Ordinance.

In *Croson*, this Court held that a Richmond, Virginia ordinance was unconstitutional on equal protection grounds. The Richmond ordinance on its face *required* prime contractors to subcontract at least 30 percent of the dollar amount of the contract to MBEs. This Court properly applied the "strict scrutiny" standard of review to the Richmond ordinance in *Croson* because it denied "certain citizens the opportunity to compete for a fixed percentage of public contracts based solely on their race." Here, the Ordinance does not deny anyone the right to compete for any contract nor does it give the bids of

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[15] In *S. J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 758 (11th Cir.), *cert. denied*, 500 U.S. 959 (1991), the Court stated: "Were we to agree with Grove's reasoning regarding this so-called injury, then bidders subject to any universally applicable requirements (*e.g.*, time of bid, manner of bid, place of bid) would allege injury sufficient to satisfy the standing requirement."

W/MBEs any advantage over the bids of nonminority male contractors.

In spite of the District Court's view of "the rational basis test as the appropriate standard of review," both the District Court and the Court of Appeals applied strict scrutiny to the Ordinance. As the District Court acknowledged, however, the Ordinance does not create a racial classification mandating the application of strict scrutiny. It requires only an accounting of efforts made to solicit diverse participation, which accounting cannot be equated with a racial classification. App. 61.

The Ordinance provides no quotas, set-asides or bid preferences, and failure to meet the goals does not determine the contract award. Accordingly, it is not subject to the strict scrutiny test, but rather to the rational relationship test traditionally employed in equal protection analysis where no suspect classification exists. *Contractors Association of E. Pa., Inc. v. City of Phila.*, 945 F.2d 1260 (3rd Cir. 1991) (Higginbotham, J., concurring); *Associated Pa. Constructors v. Jannetta*, 738 F. Supp. 891, 893 (M.D. Pa. 1990); *see also First Capital Insulation v. Jannetta*, 768 F. Supp. 121, 124 (M.D. Pa. 1991) (rejected bidder failed to establish that 15% MBE and 5% WBE participation levels were applied as quotas). Under this standard a classification is upheld so long as it is rationally related to a legitimate governmental goal. *See* App. 59-60. Without question, nondiscrimination in city contracts is a legitimate governmental goal.[16] Therefore, the Ordinance is

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[16] The WBE provisions of the Ordinance are substantially related to the important governmental interest of preventing

constitutional on its face, and the Court of Appeals improperly applied the strict scrutiny standard of review.

II. The Decision Of The Court Of Appeals Raises Important Constitutional Issues

In undertaking remedial affirmative action, a municipality is faced with balancing two competing constitutional concerns. As Justice O'Connor noted in *Wygant*, public actors are "trapped between the competing hazards of liability to minorities if affirmative action is not taken to remedy discrimination and liability to nonminorities if affirmative action is taken." *Wygant*, 476 U.S. at 291. The *Croson* and *Wygant* decisions provide guidance to public actors faced with balancing these two competing constitutional interests.

While subjecting remedial affirmative action legislation to strict scrutiny, this Court rejected the precept that a municipality must prove past discrimination before it can establish a strong basis in evidence for remedial affirmative action. Yet, by ignoring the interplay between summary judgment principles and the strong basis in evidence standard set forth in *Croson* and *Wygant*, the Court of Appeals would require a municipality to prove past discrimination in order to establish a compelling governmental interest. This result is not only contrary to

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discrimination against women in city contracting, and are constitutional even if a gender-based classification exists. There can be no question that Petitioner is entitled to summary judgment on the WBE portion of the Ordinance.

the dictates of *Croson* and *Wygant*, but is also in conflict with decisions of other courts of appeals. In addition, the Court of Appeals' requirement of a nexus between public and private discrimination, and its refusal to hold that statistical disparities may, as a matter of law, be based upon availability, conflicts with decisions of this Court and that of other courts of appeals. It is critical that in this area of national concern, this Court resolve these conflicts and provide more precise guidance to municipalities.

While this Court has addressed the issues of standing and standard of review with respect to remedial affirmative action programs (quotas or preferences), it has not addressed these issues in the context of local legislation which merely attempts to prevent future discrimination by requiring an accounting of good faith efforts to solicit bids from W/MBE subcontractors. Such limited outreach programs do not trammel upon the rights of the majority – there being no constitutional right to discriminate on municipal contracts – and avoid the divisiveness of quotas or preferences. The degree to which Petitioner avoided divisive, race-based remedial measures is evidenced by the coalition of local industry groups, including the local chapter of the Associated General Contractors, supporting Petitioner's position in the Court of Appeals. App. 176.

If this Court declines to address the important issues raised herein, it is sanctioning endless, expensive and divisive litigation against public actors on the basis of allegations which are properly resolved on motion for summary judgment.

III. Conclusion

Petitioner respectfully requests that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted this 12th day of January, 1995.

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CONCRETE WORKS OF COLORADO, INC., a Colorado corporation,

Plaintiff-Appellant,

v.

DENVER, CITY AND COUNTY OF, a municipal corporation,

Defendant-Appellee,

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.; COLORADO BUILDING INDUSTRY COALITION; and HISPANIC CONTRACTORS OF COLORADO,

Amici Curiae.

No. 93-1095

(Filed Sep. 23, 1994)

Appeal from the United States District Court
for the District of Colorado
(D.C. No. Civ. No. 92-F-21)

Todd S. Welch of Mountain States Legal Foundation, Denver, Colorado (William Perry Pendley and John G. Nelson, with him on the brief) for Plaintiff-Appellant.

Angelina Irizarry of Irizarry & McCall, Denver, Colorado (Raymond D. McCall of Irizarry & McCall, and Daniel E. Muse, John R. Gross, Norman R. Bangeman, and Victoria Ortega of Denver City Attorney's Office, with her on the brief) for Defendant-Appellee.

Wm. Bradford Reynolds of Dickstein, Shapiro & Morin, Washington, D.C., for Amicus Curiae Associated General Contractors of America, Inc.

Michael J. Glade of Inman Flynn & Biesterfeld, P.C., Denver, Colorado for Amicus Curiae Colorado Building Industry Coalition (Hispanic Contractors of Colorado also join in this Brief).

Before **WHITE**, Associate Justice (Ret.),* **LOGAN** and **EBEL**, Circuit Judges.

EBEL, Circuit Judge.

In this appeal, we consider whether the City and County of Denver's race- and gender-conscious public contract award program complies with the Fourteenth Amendment's guarantee of equal protection of the laws. Plaintiff-Appellant Concrete Works of Colorado, Inc.

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* The Honorable Byron R. White, Associate Justice of the United States Supreme Court, (Ret.), sitting by designation, pursuant to 28 U.S.C. § 294(a).

("Concrete Works") appeals the district court's summary judgment order upholding the constitutionality of Denver's public contract program. We conclude that genuine issues of material fact exist with regard to the evidentiary support that Denver presents to demonstrate that its program satisfies the requirements of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Accordingly, we reverse and remand.

I. Background

On September 4, 1990, the Denver City Council enacted Ordinance No. 513 ("Ordinance") to enable certified racial minority business enterprises ("MBEs")[1] and women-owned business enterprises ("WBEs") to participate in public works projects "to an extent approximating the level of [their] availability and capacity." Denver, Co., Rev. Mun. Code ch. 28, art. III, § 28-53 (Supp. 1990). This Ordinance is the most recent in a series of provisions that the Denver City Council has adopted since 1983 to remedy perceived race and gender discrimination in the distribution of public and private construction contracts.[2]

The Ordinance imposes five requirements for a business to obtain certification as an MBE or WBE: (1) that it be 51 percent owned by one or more eligible racial minorities or women; (2) that it be managed and controlled by

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[1] The Ordinance defines racial minorities as "person[s] of Black, Hispanic, Asian-American, or American Indian descent." Denver, Co., Rev. Mun. Code ch. 28, art. III, § 28-54 (Supp. 1990).

[2] In addition to modifying the design of the initial program implemented in 1983, the 1990 Ordinance expanded its scope to include certain public contracts not previously covered.

one or more eligible racial minorities or women; (3) that it has been actively in business for at least three months; (4) that the business demonstrate, by written documentation or affidavit, that it has suffered from past race or gender discrimination in Denver's construction industry; and (5) that it has not generated annual revenues that exceed $10 million for "building construction" or "heavy construction," $5 million for "special trade contractors," or $3 million for "engineering, accounting, research management and related services." Ordinance § 28-54; § 28-73(b)-(c); § 28-74. To maintain eligibility, an MBE or WBE must annually submit a renewal application that updates and reaffirms these certification requirements. § 28-73(d).

The Ordinance directs the Office of Contract Compliance ("OCC") to establish goals, on a project-by-project basis, for the participation level of MBEs and WBEs in city projects. Ordinance § 28-56. Prior to the solicitation of bids for a specified project, an MBE and/or WBE participation goal (measured as a percent of each project's design and construction cost) is set according to the OCC's assessment of the capacity and availability of MBEs and WBEs for the project. The statutory goals for total annual "construction" expenditures are 16 percent for MBEs and 12 percent for WBEs; the goal for "design services" is 10 percent for both MBEs and WBEs. Ordinance § 28-55(a). The Ordinance does not require the OCC to set participation goals for every project and the OCC often sets individual project goals below the annual goals levels.

If the OCC establishes a project goal, all bidders must demonstrate either how they intend to satisfy that goal or that they have made a good faith effort to do so. Satisfaction

of one of these two standards renders a bidder eligible to compete, and the contract is then awarded to the lowest eligible bidder, regardless of the race or gender of that bidder.

To satisfy a project's goal, the bidder may: (1) itself be a certified MBE or WBE; (2) form a joint venture with a certified MBE or WBE; or (3) enlist certified MBEs and WBEs as subcontractors or suppliers. Ordinance § 28-57.[3] If the bidder cannot meet the project goal by one of these stated means, then it must submit a statement addressing the Ordinance's ten requirements to establish good faith.[4]

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[3] Ordinance sections cited herein governing treatment of bids relate to construction, reconstruction, and remodelling projects. Largely similar provisions exist for design and construction services. Ordinance §§ 28-61 to 28-64.

[4] Pursuant to § 28-58, the statement of good faith must include a specific response to the following:

> (1) knowledge of information provided during a pre-bid meeting convened by the city to inform MBEs and WBEs of subcontracting opportunities on the project; (2) verification of advertisement soliciting bids from MBEs and WBEs, for three consecutive days, in general or construction-related publications approved by the OCC Director; (3) verification of efforts to contact, by timely written notice, all appropriate MBEs and WBEs within identified subcontracting categories; (4) verification of efforts to subcontract, consistent with industry practice, with the MBEs and WBEs whom the bidder has contacted or who have contacted the bidder; (5) verification that the bidder attempted to recruit MBEs and WBEs from at least the same geographical area from which it attempted to recruit other subcontractors and other members of a joint venture; (6) verification that, consistent with industry practice, the bidder afforded

Consistent with this good-faith standard, the prime contractor is not required to hire MBE or WBE subcontractors who are not the lowest bidders or who are unqualified. In other words, the project goals do not impose unyielding numerical quotas.

The Ordinance empowers the OCC to assess the credibility of a bidder's good-faith showing. If the OCC determines that the bidder has failed to comply with the Ordinance's requirements, the bid is deemed "nonresponsive" and the bidder is ineligible to receive the contract award. Ordinance § 28-59; § 28-64. However, the contractor may petition the OCC Director to conduct a hearing to

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MBEs and WBEs necessary access to, and adequate time to review, all necessary project plans, drawings, specifications and other documents as well as adequate time to prepare subcontract bids and/or negotiate joint venture arrangements; (7) verification that, reasonably consistent with industry practice and the bidder's past practices on similar projects, the bidder selected portions of the work to be performed by MBEs and WBEs to achieve the project goals, including consideration of structuring the contract into economically feasible units to facilitate meaningful MBE and WBE participation as subcontractors or suppliers; (8) for each MBE and WBE who contacted the bidder or whom the bidder contacted or attempted to subcontract with, a statement explaining why the bidder and the MBE or WBE did not succeed in reaching subcontracting or joint venture agreement; (9) verification that the bidder rejected MBEs and WBEs because the firms failed to submit the lowest bid or were not "qualified" under the terms of § 28-54; and (10) verification that the bidder attempted to assist MBEs and WBEs in obtaining bonds, if any were required.

review the finding of nonresponsiveness. § 28-33(a). If the contractor remains unsatisfied with the final ruling issued after the hearing, it may seek judicial review in state court pursuant to Col. R. Civ. P. 106(a)(4). § 28-33(d)-(e).

On January 6, 1992, Concrete Works, a nonminority and male-owned construction firm, commenced this Equal Protection Clause challenge to the Ordinance. Concrete Works alleged that the Ordinance caused it to lose three construction contracts for failure to comply with either the stated MBE and WBE participation goals or the good-faith requirements. Rather than pursuing administrative or state court review of the OCC's findings, Concrete Works initiated this action, seeking a permanent injunction against enforcement of the Ordinance and damages for lost contracts.

On February 26, 1993, and after extensive discovery, the district court granted Denver's summary judgment motion. *Concrete Works, Inc. v. City and County of Denver,* 823 F. Supp. 821 (D. Colo. 1993). The court concluded, albeit not without reservations, that Concrete Works had standing to bring this claim. With respect to the merits, the court held that Denver's program satisfied the strict scrutiny standard embraced by a majority of the Supreme Court in *Croson* because it was narrowly tailored to achieve a compelling government interest. First, the court determined that Denver's factual showing of past race and gender discrimination justified its compelling government interest in remedying such discrimination. *Id.* at 831-41. Second, the court reasoned that the program was narrowly tailored to meet that end because: (1) Denver first considered race- and gender-neutral means of

increasing MBE and WBE participation; (2) the Ordinance creates a flexible scheme rather than a rigid numerical quota; (3) the Ordinance does not require prime contractors to hire an MBE or WBE subcontractor who fails to submit the lowest bid; and (4) the Ordinance applies only to contracts awarded by Denver for public works projects within the City and County of Denver. *Id.* at 841-45. Concrete Works timely appealed the court's summary judgment order.

II. Procedural Posture and Standards of Review

A. Standard of Review

We review de novo the grant of summary judgment and apply the same standard used by the district court. *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We examine the factual record and reasonable inferences therefrom in the light most favorable to Concrete Works, the party opposing summary judgment. *Applied Genetics*, 912 F.2d at 1241.

Denver, as the moving party, has the initial burden to show "that there is an absence of evidence to support the nonmoving party's case." *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). Once the moving party meets this burden, the burden shifts to the

nonmoving party to demonstrate a genuine issue for trial on a material matter. *Id.* In so doing, the nonmoving party may not rest solely on the allegations in its pleadings, but must instead, by its "own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp.*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)).

At the summary judgment stage, the judge's function is not to weigh the evidence and determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Nonetheless, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party," summary judgment in favor of the moving party is proper. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

B. Standing

At the outset, we consider Denver's contention that Concrete Works fails to satisfy its burden of establishing standing to challenge the Ordinance's constitutionality. *See Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992) (setting forth the burden of establishing standing). Although the district court ultimately ruled that Concrete Works does have standing, the court characterized the company's showing as "extraordinarily weak" because it "has not established that it was refused a contract because of the race or gender of its owner." *Concrete Works*, 823 F. Supp. at 827-28.

Just a few months after the district court entered its judgment, however, the Supreme Court clarified that a

contractor who challenges a minority preference contract scheme on equal protection grounds need not show that it would have received a contract absent the city ordinance. *Northeastern Fla. Chapter of the Associated Gen. Contractors of America v. Jacksonville*, 113 S. Ct. 2297, 2299 (1993). The Court explained that, so long as the non-minority contractor can show that it was "able and ready to bid" on a contract subject to the ordinance, the requisite "injury in fact" under Article III arises from an inability to "compete [with minority contractors] on an equal footing" due to that ordinance's discriminatory policy. *Id.* at 2303.

Guided by this principle, we conclude that Concrete Works has demonstrated "injury in fact" because it submitted bids on three projects and the Ordinance prevented it from competing on an equal basis with minority and women-owned prime contractors.[5] Specifically, the

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[5] It is undisputed that Concrete Works unsuccessfully competed for the Lakewood and Dry Gulch Storm Drainage Improvement Project, the Colorado Boulevard Median Improvement Project, and the Sixth and Josephine Avenue Improvement Project. With respect to the Sixth and Josephine Avenue Improvement Project, Concrete Works offered uncontested evidence that it submitted the lowest bid, but was deemed "non-responsive" due to its failure to meet the project MBE goals or the good faith requirements. Instead, Denver awarded the contract to the second lowest bidder, who was given credit for 55 percent MBE participation because it was a certified MBE and stated its intent to perform 55 percent of the work. Thus, had Concrete Works "been granted the same racial preference given to [the second lowest bidder who was an MBE], its bid would [sic] been considered in compliance with the MBE/WBE ordinance, and it would not have had its bid rejected as non-responsive." Aplt. App. at 86.

unequal nature of the bidding process lies in the Ordinance's requirement that a nonminority prime contractor must meet MBE and WBE participation goals by entering into joint ventures with MBEs and WBEs or hiring them as subcontractors (or satisfying the ten-step good faith requirement). In contrast, minority and women-owned prime contractors may use their own work to satisfy MBE and WBE participation goals. Ordinance § 28-57. Thus, the extra requirements impose costs and burdens on nonminority firms that preclude them from competing with MBEs and WBEs on an equal basis.[6] *See Contractors Ass'n v. Philadelphia*, 6 F.3d 990, 995-96 (3d Cir. 1993) (holding that nonminority contractors had standing to challenge a City of Philadelphia ordinance that closely parallels the Denver scheme – the ordinance requires a city agency to set MBE participation goals and authorizes it to issue waivers for nonminority general contractors who are unable to satisfy the goals after a good faith effort); *Cone Corp. v. Hillsborough County*, 5 F.3d 1397, 1399 (11th Cir. 1993) (reversing, in the wake of *Northeastern Florida*, the

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[6] Admittedly, the City of Jacksonville's ordinance at issue in *Northeastern Florida* differs from Denver's Ordinance inasmuch as the Jacksonville provision required the set-aside of 10 percent of the annual amount spent on city contracts to minority firms, whereas Denver imposes no such inflexible numerical goal. Nonminority firms in Denver may submit bids on every city project, while their counterparts in Jacksonville are foreclosed from bidding on those projects reserved for minority business enterprises. *Northeastern Fla.*, 113 S. Ct. at 2299 (citation omitted). Nonetheless, what is dispositive for our standing analysis is that both ordinances "make[ ] it more difficult for members of one group to obtain a benefit than it is for members of another." *Id.* at 2303.

district court's dismissal of nonminority contractor's suit because the county's contract program treated minority and nonminority contractors differently).

In addition to demonstrating "injury in fact," Concrete Works also satisfies the two remaining elements to establish standing: (1) a causal relationship between the injury and the challenged conduct; and (2) a likelihood that the injury will be redressed by a favorable ruling. *Northeastern Fla.*, 113 S. Ct. at 2302 (citations omitted). Thus, we conclude that Concrete Works has standing to challenge the constitutionality of Denver's race- and gender-conscious contract program.

C. Equal Protection Clause Standards

The final preliminary matter we must address is the standard of equal protection review that governs our analysis. The Fourteenth Amendment provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV.

We determine the appropriate standard of equal protection review by examining the nature of the classifications embodied in the statute. We apply strict scrutiny to the Ordinance's race-based preference scheme and thus inquire whether the statute is narrowly tailored to achieve a compelling government interest. *Croson*, 488 U.S. at 493-95 (plurality) (adopting strict scrutiny test); *id.* at 520 (Scalia, J., concurring in judgment) (supporting strict scrutiny standard of plurality). Gender-based classifications, in contrast, are evaluated under the intermediate scrutiny rubric, which provides that the law must be

substantially related to an important government objective. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 & n.9 (1982); *Rowley v. Board of Educ.*, 863 F.2d 39, 40 (10th Cir. 1988).

III. Permissible Evidence and Burdens of Proof

In *Croson*, a plurality of the Court concluded that state and local governments have a compelling interest in remedying identified past and present discrimination within their borders. *Croson*, 488 U.S. at 492, 509. The plurality explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a " 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by allowing tax dollars "to finance the evil of private prejudice." *Id.* at 492.[7]

Before assessing whether Denver's factual support for its program satisfies the particularized showing of discrimination required by *Croson*, however, we address

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[7] Apparently, the three dissenting Justices agreed with the plurality that a municipality may design its procurement program to remedy discrimination in both the public and private sectors. *Croson*, 488 U.S. at 536-38 (Marshall, J., dissenting). Only Justice Scalia's opinion concurring in the judgment espoused the view propounded by Concrete Works that the only instance in which the States may implement a race-conscious system is to "eliminate their own maintenance of a system of unlawful racial classification." *Id.* at 524 (Scalia, J., concurring in judgment).

the parties' dispute over the geographical scope and the type of the statistical and anecdotal evidence that informs our analysis. Additionally, we set forth the burdens of production and proof.

A. Geographic Scope of the Data

Concrete Works contends that *Croson* precludes us from considering empirical evidence of discrimination in the six-county Denver Metropolitan Statistical Area (MSA). Instead, it would allow Denver only to use data describing discrimination within the City and County of Denver.

A majority in *Croson* observed that because discrimination varies across market areas, state and local governments cannot rely on national statistics of discrimination in the construction industry to draw conclusions about prevailing market conditions in their own regions. *Id.* at 504. The relevant area in which to measure discrimination, then, is the local construction market, but that is not necessarily confined by jurisdictional boundaries.

The Denver MSA is defined by the United States Office of Management and Budget according to the existence of a population nucleus and the high degree of economic and social integration in the region. Aplt. App. at 495. *Croson* supports our consideration of data from the Denver MSA because this data is sufficiently geographically targeted to the relevant market area. The record reveals that over 80 percent of Denver Department of Public Works ("DPW") construction and design contracts are awarded to firms located within the Denver MSA.

To confine the permissible data to a governmental body's strict geographical boundaries would ignore the economic reality that contracts are often awarded to firms situated in adjacent areas. It is important that the pertinent data closely relate to the jurisdictional area of the municipality whose program we scrutinize, but here Denver's contracting activity, insofar as construction work is concerned, is closely related to the Denver MSA. *See Contractors Ass'n*, 6 F.3d at 1003-09 (considering data from the Philadelphia MSA). The Denver MSA is thus an excellent proxy for the local construction market. Therefore, we hold that data from the Denver MSA is adequately particularized for strict scrutiny purposes.

B. Anecdotal Evidence

Concrete Works next argues that the district court committed reversible error by considering such non-empirical evidence of discrimination as testimony from minority and women-owned firms delivered during public hearings, affidavits from MBEs and WBEs, summaries of telephone interviews that Denver officials conducted with MBEs and WBEs, and reports generated during Office of Affirmative Action compliance investigations.

The selective anecdotal evidence about minority contractors' experiences, without more, would not provide a strong basis in evidence to demonstrate public or private discrimination in Denver's construction industry sufficient to pass constitutional muster under *Croson*. Personal accounts of actual discrimination or the effects of discriminatory practices may, however, vividly complement empirical evidence. Moreover, anecdotal evidence of a

municipality's institutional practices that exacerbate discriminatory market conditions are often particularly probative. Therefore, the government may include anecdotal evidence in its evidentiary mosaic of past or present discrimination. *See Contractors Ass'n*, 6 F.3d at 1002-03 (weighing Philadelphia's anecdotal evidence); *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991) ("[T]he combination of convincing anecdotal and statistical evidence is potent."), *cert. denied*, 112 S. Ct. 875 (1992); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir.) (supplementing Hillsborough County's statistical evidence with testimony from MBEs who filed complaints to the County about prime contractors' discriminatory practices), *cert. denied*, 498 U.S. 983 (1990). Concrete Works cites no case, and we have found none, eschewing the consideration of anecdotal evidence.

In the context of employment discrimination suits arising under Title VII of the Civil Rights Act of 1964, the Supreme Court has stated that anecdotal evidence may bring "cold numbers convincingly to life." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977). In fact, the majority in *Croson* impliedly endorsed the inclusion of personal accounts of discrimination. Croson. 488 U.S. at 480 (noting as a weakness in the City's case that the Richmond City Council heard "no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors").

Accordingly, we deem anecdotal evidence of public and private race and gender discrimination appropriate supplementary evidence in our strict scrutiny calculus.

C. Post-Enactment Evidence

Concrete Works lastly admonishes us to consider only evidence of discrimination that existed prior to Denver's enactment of the Ordinance. In other words, Concrete Works contends that any reports or studies that were published after September 4, 1990, the date the Ordinance was enacted, are devoid of probative value in assessing the constitutionality of the Ordinance.

In *Croson*, the Court underscored that a municipality "must identify [the] discrimination . . . with some specificity *before* [it] may use race-conscious relief." *Croson*, 488 U.S. at 504 (emphasis added). Absent any pre-enactment evidence of discrimination, a municipality would be unable to satisfy *Croson*. However, we do not read *Croson's* evidentiary requirement as foreclosing the consideration of post-enactment evidence. Indeed, post-enactment evidence, if carefully scrutinized for its accuracy, will often prove quite useful in evaluating the remedial effects or shortcomings of the race-conscious program. This is especially true in the instant case, where Denver first implemented a limited affirmative action program in 1983 and has since modified and expanded its scope.

The strong weight of authority endorses the admissibility of post-enactment evidence to determine whether an affirmative action contract program complies with *Croson*. *See. e.g.*, *Contractors Ass'n*, 6 F.3d at 1003-04; *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir. 1992); *Coral Constr.*, 941 F.2d at 921. In *Contractors Association*, as here, the challenger sought prospective relief in the form of a permanent injunction. The

Third Circuit sensibly reasoned that "[c]onsideration of post-enactment evidence is especially appropriate . . . where the principal relief sought . . . was an injunction," because "it makes sense to consider *all available evidence*" when contemplating prospective relief. *Contractors Ass'n*, 6 F.3d at 1004 (emphasis added).

We agree that post-enactment evidence may prove useful for a court's determination of whether an ordinance's deviation from the norm of equal treatment is necessary. Thus, evidence of discrimination existing subsequent to enactment of the 1990 Ordinance is properly before us.

D. Burdens of Production and Proof

The Court in *Croson* struck down the City of Richmond's minority set-aside program because the City failed to provide an adequate evidentiary showing of past or present discrimination. *Croson*, 488 U.S. at 498-506. Because the Fourteenth Amendment only tolerates race-conscious programs that narrowly seek to remedy identified discrimination, the Court in *Croson* explained that state and local governments "must identify that discrimination . . . with some specificity before they may use race-conscious relief." *Id.* at 504. The Court's benchmark for judging the adequacy of the government's factual predicate for affirmative action legislation was whether there exists a "*strong basis in evidence* for [the government's] conclusion that remedial action was necessary." *Id.* at 500

(quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion)) (emphasis added).[8]

Although *Croson* places the burden of production on the municipality to demonstrate a "strong basis in evidence" that its race- and gender-conscious contract program aims to remedy specifically identified past or present discrimination, the Fourteenth Amendment does not require a court to make an ultimate judicial finding of discrimination before a municipality may take affirmative steps to eradicate discrimination. *Wygant*, 476 U.S. at 292

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[8] A majority in *Croson* concluded that Richmond's evidence did not satisfy this standard. The Court first found unpersuasive the Richmond City Council's mere declaration that the program was "remedial." *Croson*, 488 U.S. at 500 ("the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight"). The City's empirical evidence was also of scant probative value. Specifically, the Court discredited the statistical pool employed by the City to demonstrate discrimination in the construction industry. Whereas the City pointed to the disparity between the number of prime contracts awarded to minority firms and the City's minority population, the Court reasoned that a more appropriate comparison would be between the number of contracts awarded to minority firms and the number of qualified minority contractors. *Id.* at 501-02. The Court further observed that national data about discrimination in the construction industry offered little insight into the particular conditions in Richmond. *Id.* at 504 ("If all a state or local government need do is find a congressional report on the subject to enact a set-aside program, the constraints of the Fourteenth Amendment Clause will, in effect, have been rendered a nullity."). The Court remained similarly unconvinced by the City's evidence of the low minority membership in local contractors' associations in the absence of data on the number of minority firms eligible for membership in these trade organizations. *Id.* at 503.

(O'Connor, J., concurring in part and concurring in the judgment). An affirmative action response to discrimination is sustainable against an equal protection challenge so long as it is predicated upon strong evidence of discrimination. *Croson*, 488 U.S. at 504.

An inference of discrimination may be made with empirical evidence that demonstrates "a significant statistical disparity between the number of qualified minority contractors . . . and the number of such contractors actually engaged by the locality or the locality's prime contractors." *Id.* at 509 (plurality). We do not read *Croson* to require, nor do we embrace, an attempt to craft a precise mathematical formula to assess the quantum of evidence that rises to the *Croson* "strong basis in evidence" benchmark. That must be evaluated on a case-by-case basis.

Further, the adequacy of a municipality's showing of discrimination must be evaluated in the context of the breadth of the remedial program advanced by the municipality. *Id.* at 498. Ultimately, whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling interest for the municipality to enact a race-conscious ordinance, is a question of law. *Associated Gen. Contractors v. New Haven*, 791 F. Supp. 941, 944 (D. Conn. 1992). Underlying that legal conclusion, however, are factual determinations about the accuracy and validity of a municipality's evidentiary support for its program.

Notwithstanding the burden of initial production that rests with the municipality, "[t]he ultimate burden

[of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Wygant*, 476 U.S. at 277-78 (plurality); *see also Johnson v. Transportation Agency*, 480 U.S. 616, 626-27 (1987) (noting in the Title VII context that "[i]f [an affirmative action] plan is articulated as the basis for the employer's decision [to take race or gender into account in an employment decision], the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid."); *Contractors Ass'n*, 6 F.3d at 1005 (explaining that "the Contractors, not the City, bear the burden of proof"). As Justice O'Connor's concurring opinion in *Wygant* explained, when the governmental entity

> introduces its statistical proof as evidence of its remedial purpose, thereby supplying the court with the means for determining that the [entity] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the nonminority [challengers] to prove their case; they continue to bear the ultimate burden of persuading the court that the [entity's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently "narrowly tailored."

Wygant, 476 U.S. at 293 (O'Connor, J., concurring in part and concurring in the judgment). Thus, once Denver presented adequate statistical evidence of precisely defined discrimination in the Denver area construction market, it became incumbent upon Concrete Works either to establish that Denver's evidence did not constitute strong

evidence of such discrimination or that the remedial statute was not narrowly drawn. Absent such a showing by Concrete Works, summary judgment upholding Denver's Ordinance would be appropriate.

It is "through the prism" of these evidentiary burdens, *Liberty Lobby*, 477 U.S. at 254, that we evaluate the record in Concrete Works' appeal from the district court's summary judgment ruling.

IV. Evidentiary Predicate Underlying Denver's Ordinance

Having established the geographical scope and the type of evidence that must inform our equal protection analysis, as well as the governing burdens of production and proof, we turn to the principal question in this appeal: has Denver satisfied the compelling government interest prong of *Croson* by demonstrating a "strong basis in evidence" that its race- and gender-conscious contract program seeks to remedy identified past and present discrimination in the construction industry within its local area? *Croson*, 488 U.S. at 500. In addressing this question, we are particularly mindful that this appeal comes to us at the summary judgment stage, where the court's task is not to weigh the evidence, but rather to discern whether "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Matsushita*, 475 U.S. at 587.

The evidence of discrimination that Denver presents to demonstrate a compelling government interest in enacting the Ordinance consists of three categories: (1) evidence of discrimination in city contracting from the

mid-1970s to 1990; (2) data about MBE and WBE utilization in the overall Denver MSA construction market between 1977 and 1992; and (3) anecdotal evidence that includes personal accounts by MBEs and WBEs who have experienced both public and private discrimination and testimony from city officials who describe institutional governmental practices that perpetuate public discrimination.[9]

A. Discrimination in the Award of Public Contracts

We begin by considering the evidence that Denver presents to demonstrate underutilization of MBEs and WBEs in the award of city contracts from the mid 1970s to 1990. As described more fully below, Denver offers persuasive pieces of evidence that, considered in the abstract, could give rise to an inference of race- and gender-based public discrimination on isolated public works projects.[10] However, the record also shows that

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[9] Concrete Works correctly notes that Fed. R. Civ. P. 6(d) requires a party who files a written motion to serve supporting affidavits with that motion. *Olson v. Stone*, 588 F.2d 1316, 1321 (10th Cir. 1978). Denver does not contest that Exhibits I, J, K, L, M, N, O, P, and Q were not filed with its summary judgment motion, but instead were submitted with its reply brief. However, inasmuch as these exhibits respond to specific questions raised by Concrete Works in its brief in opposition to summary judgment, Aplee. App. at 65, the court properly considered them.

[10] To demonstrate this underutilization of MBEs and WBEs, Denver employs the oft-used statistical device known as the "disparity index." *See Contractors Ass'n*, 6 F.3d at 1005 (Third

MBE and WBE utilization on public contracts as a whole during this period was quite strong in comparison to the total number of MBEs and WBEs within the local construction industry. Denver offers a rebuttal to this more general evidence, but it is clear that the weight to be given both to the general evidence and to the specific evidence relating to individual contracts presents genuine disputes of material facts. What follows is an analysis of the factual record and an identification of the genuine material issues of fact arising from the parties' competing evidence.

(1) Federal Agency Reports of Discrimination in Denver

First, Denver offers federal agency reports of discrimination in Denver public contract awards. The record contains a summary of a 1978 study by the United States General Accounting Office ("GAO"), which shows that between 1975 and 1977 minority businesses were significantly underrepresented in the performance of Denver public contracts that were financed in whole or in part by federal grants. Aplt. App. at 349-51. Of the $56 million in

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Circuit joining the First, Ninth, and Eleventh Circuits in relying on disparity indices to determine whether a municipality satisfies *Croson's* evidentiary burden). The disparity index is calculated by dividing the percentage of MBE and WBE participation in city contracts by the percentage of MBEs and WBEs in the relevant population of local construction firms. A disparity index of 1 demonstrates full MBE and WBE participation, whereas the closer the index is to zero, the greater the MBE and WBE underutilization. Some courts multiply the disparity index by 100, thereby creating a scale between 0 and 100, with 100 representing full MBE or WBE utilization.

federally-funded construction contracts that the DPW awarded between July 1975 and December 1977, only about $2.5 million (or less than five percent) was awarded to minority contractors. *Id.* at 351. According to GAO estimates at the time of its study, approximately 11 percent of the construction firms in the Denver MSA were owned by minorities. In addition, GAO identified certain DPW practices that adversely affected minority contractors' likelihood of participating in public works projects.[11]

Concrete Works argues that a material fact issue arises about the validity of this evidence because "the 1978 GAO Report was nothing more than a listing of the problems faced by all small firms, first starting out in business." However, Concrete Works ignores the GAO Report's empirical data, which quantifies the actual disparity between the utilization of minority contractors and their representation in the local construction industry. In addition, we note that the GAO Report reflects the findings of an objective third party. Because this data remains uncontested, notwithstanding Concrete Works' conclusory allegations to the contrary, the 1978 GAO Report provides evidence to support Denver's showing of discrimination.

Added to the GAO findings is a 1979 letter from the United States Department of Transportation ("US DOT")

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[11] Among the impediments were the costs arising from prequalification requirements, the fact that DPW published solicitations in trade journals to which minority contractors did not subscribe due to budgetary constraints, and short time constraints often imposed in the bid solicitations.

to William H. McNichols, Mayor of the City of Denver, describing the US DOT Office of Civil Rights' study of Denver's discriminatory contracting practices at Stapleton International Airport. Aplt. App. at 266-68. US DOT threatened to withhold additional federal funding for Stapleton because Denver had "denied minority contractors the benefits of, excluded them from, or otherwise discriminated against them concerning contracting opportunities at Stapleton," in violation of Title VI of the Civil Rights Act of 1964 and other federal laws. *Id.* at 266.[12]

The following data reflects the low level of MBE and WBE utilization on Stapleton contracts prior to Denver's adoption of an MBE and WBE goals program at Stapleton in 1981: for the years 1977 to 1980, respectively, MBE utilization was 0 percent, 3.8 percent, .7 percent, and 2.1 percent; data on WBE utilization was unknown for the years 1977 to 1979, and it was .05 percent for 1980. Aplt. App. at 265.

Like its unconvincing attempt to discredit the GAO Report, Concrete Works presents no evidence to challenge the validity of US DOT's allegations. Instead, Concrete Works contends that because the district court in the 1979 suit between Denver and the US DOT determined

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[12] When US DOT concluded that Denver had failed to comply with proposals to remedy this discrimination, litigation was commenced in the United States District Court for the District of Colorado. The parties ultimately settled the case in 1980 and, in 1981, Denver adopted a race- and gender-conscious contract program for federally-funded projects at Stapleton. Aplt. App. at 174, 269-70.

that this letter constituted only initial determinations and not final findings following a hearing, Denver cannot use the letter as factual support in the instant case. However, Concrete Works fails to introduce evidence refuting the substance of US DOT's information, attacking its methodology, or challenging the low utilization figures for MBEs at Stapleton before 1981. Thus, Concrete Works has failed to create a genuine issue of fact about the conclusions in the US DOT's report.

In sum, the federal agency reports of discrimination in Denver's contract awards support Denver's contention that race and gender discrimination existed prior to the enactment of the challenged Ordinance.

(2) Denver's Reports of Discrimination

Denver points to evidence of public discrimination prior to 1983, the year that the first Denver ordinance was enacted.[13] A 1979 DPW "Major Bond Projects Final Report," which reviewed MBE and WBE utilization on projects funded by the 1972 and 1974 bond referenda and the 1975 and 1976 revenue bonds, showed strong evidence of underutilization of MBEs and WBEs. Aplt. App. at 353-55.[14] Based on this Report's description of the

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[13] In response to this pre-1983 evidence of discrimination and additional information gleaned during public hearings convened in 1983, the Denver City Council enacted Ordinance No. 246 in 1983 to extend the Stapleton MBE and WBE utilization goals program to other DPW projects.

[14] The projects included McNichols Sports Arena, an Engineering and Operations Center, the Police Administration

approximately $85 million in contract awards, there was 0 percent MBE and WBE utilization for professional design and construction management projects, and less than 1 percent utilization for construction. *Id.* at 354-55. The Report concluded that if MBEs and WBEs had been utilized in the same proportion as found in the construction industry, 5 percent of the contract dollars would have been awarded to MBEs and WBEs.

To undermine this stark data, Concrete Works alleges that the DPW Report contained "no information about the number of minority or women owned firms that were used" on these bond projects. Aplt. App. at 173. However, the Report's description of MBE and WBE utilization in terms of contract dollars provides a *more* accurate depiction of total utilization than would the mere number of MBE and WBE firms participating in these projects. Thus, this line of attack by Concrete Works is unavailing.

On the other hand, Concrete Works advanced expert testimony that Denver's data demonstrates strong MBE and WBE utilization on the total DPW contracts awarded between 1978 and 1982. Aplt. App. at 104, 356. For example, although MBEs represented 2 percent of the construction firms in the Denver MSA in 1977, MBEs received 6 percent of all DPW contract dollars – in other words, a disparity index of 3. Aplt. App. at 356. Further, the MBE disparity ratio for DPW contracts in 1982 was 12, because MBEs still represented 2 percent of the construction

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Building and Detention Facility, the Fire Department Headquarters, Boettcher Concert Hall, Mile High Stadium, and two city parking facilities. Aplt. App. at 354.

firms, yet received 24 percent of DPW contract dollars. *Id.*[15]

The same discrepancy between underutilization of MBEs and WBEs on some specifically identified DPW projects, and strong utilization in the overall DPW data exists as well in the post-1983 evidence on which Denver relies. Concrete Works observed that, for the years 1983 to 1989, the MBE disparity index was at least 3 in the overall DPW data and that MBEs received an average of 17.4 percent of DPW contract dollars. *Id.* at 105, 318.

However, Denver forcefully responds by pointing out that because federal and city affirmative action programs were in place from the mid-1970s to the present, this overall DPW data reflects the intended remedial effect on MBE and WBE utilization of those programs. *Id.* at 274.[16] Based on its contention that the overall DPW data was therefore "tainted" and distorted by these pre-existing affirmative action goals programs, Denver asks us to focus instead on the data generated from specific public

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[15] The record does not indicate whether the overall DPW data between 1978 and 1982 includes the low MBE and WBE utilization on DPW projects funded by the 1972 and 1974 bond referenda and the 1975 and 1976 revenue bonds. If these specific projects are in fact a subset of the overall DPW data, then we can infer that the MBE and WBE disparity index for other projects exceeded 3 in 1978 and 12 in 1982. This would further undercut Denver's pre-1983 data. However, the fact that we cannot tell from the record what comprised the overall DPW empirical data only serves to highlight that summary judgment on this record was premature.

[16] The record does not clarify the nature or scope of the federal and local programs in effect prior to Denver's enactment of the first race- and gender-conscious Ordinance in 1983.

contract programs that were, for one reason or another, insulated from federal and local affirmative action goals programs, i.e. "non-goals public projects." Given that the same local construction industry performed both goals and non-goals public contracts, *id.* at 275, Denver argues that data generated on non-goals public projects offers a control group with which we can compare MBE and WBE utilization on public contracts governed by a goals program and those insulated from such goal requirements. Denver argues that the utilization of MBEs and WBEs on non-goals projects is the better test of whether there has been discrimination historically in Denver contracting practices.

In any event, the first data from non-goals public projects that Denver identifies are MBE and WBE disparity indices on Denver Department of General Services ("DGS") contracts, which represent one-third of all city construction funding and which, prior to the enactment of the 1990 Ordinance, were not subject to the goals program instituted in the earlier ordinances for DPW contracts. *Id.* at 297.[17] The DGS data reveals extremely low MBE and WBE utilization. For MBEs, the DGS data

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[17] The DGS data was generated in the 1991 Denver Disparity Study for Goods, Services, and Remodeling, which explored both quantitative and qualitative evidence. Aplee App. at 250-417. DGS construction contracts are labelled "remodeling" projects on existing infrastructure and public buildings and work ordered pursuant to change orders. Aplt. App. at 297. Denver states that DGS contracts represent one-third of all city construction funding, but does not specify what percentage of DGS contracts are the "remodeling" projects on which it relies to show past discrimination.

shows a .14 disparity index in 1989 and a .19 disparity index in 1990 – evidence of significant underutilization. Aplee. App. at 298-301. For WBEs, the disparity index is .47 in 1989 and 1.36 in 1990 – the latter showing greater than full participation and the former demonstrating underutilization. *Id.*

These MBE disparity indices for DGS projects approximate those in other cases where courts have applied the "strong basis in evidence" standard in *Croson.*[18] The Eleventh Circuit held that a .11 disparity "clearly constitutes a prima facie case of discrimination indicating that the racial classifications in the County plan were necessary" under *Croson. Cone Corp.*, 908 F.2d at 916. In light of a disparity index of .22, the Ninth Circuit upheld the denial of a preliminary injunction to a challenger of the City of San Francisco's affirmative action program based upon an equal protection claim. *Associated Gen. Contractors, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1414 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1670 (1992). Similarly, the Third Circuit concluded that a disparity of .04 was "probative of discrimination in City contracting in the Philadelphia construction industry." *Contractors Ass'n*, 6 F.3d at 1005.[19]

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[18] As the Third Circuit recently noted, "[a]lthough not all of these cases explicitly compute disparity indices, each relies on the percentage disparities to find a pattern of discrimination." *Contractors Ass'n*, 6 F.3d at 1005 n.14.

[19] We do not have the benefit of relevant authority with which to compare Denver's disparity indices for WBEs. *See Contractors Ass'n*, 6 F.3d at 1009-11 (reviewing case law and noting that "it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination

Denver's DGS evidence is more comprehensive than the evidence in *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 424-28 (D.C. Cir. 1992), where the court reversed a denial of a preliminary injunction for the challenger because the District of Columbia failed to demonstrate a "strong basis in evidence" for its contract program. There, the District of Columbia provided data of minority utilization for construction contracts let by only one government agency in one year. Although this data showed that 3.4 percent of the construction dollars went to minority firms, the data also revealed that the same agency awarded in excess of 30 percent of repairs, improvement, and architectural contracts, and nearly 25 percent of material management contracts, to minority firms. The District of Columbia additionally failed to provide any data about discrimination in the private construction industry and relied on data generated before an amendment to the ordinance narrowed the eligibility pool to firms whose principal place of business was the District of Columbia or who successfully demonstrated that they were "local business enterprises."

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necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary"). Nevertheless, Denver's data indicates significant WBE underutilization such that the Ordinance's gender classification arises from "reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions." *Mississippi Univ. of Women*, 458 U.S. at 726 (striking down, under the intermediate scrutiny standard, a state statute that excluded males from enrolling in a state-supported professional nursing school).

The second set of data reflecting distinct MBE and WBE underutilization on non-goals public projects consists of separate DPW projects on which no goals program was imposed.[20] In this category, Denver offered data about MBE and WBE utilization on the 1985 Housing Bond and Museum of Natural History Projects and unnamed bond projects between 1972 and 1977. Aplt. App. at 274-75.[21] For the Housing Bond Project, the MBE disparity index was .43 and WBE disparity index was .09. *Id.* at 275. Similarly, the MBE disparity index for the Museum Project was .48 and the WBE figure was .40. *Id.* And finally, the MBE disparity index on the 1972 to 1976 bond projects was .63, while the WBE disparity index was .29. *Id.*

Concrete Works attempts to trivialize the significance of this data by contending that the projects, in dollar terms, reflect a small fraction of the total Denver MSA construction market. But Concrete Works misses the point. The data is not intended to reflect conditions in the overall market; it instead speaks solely to the utilization levels for city-funded projects on which no MBE and WBE goals were imposed. It is particularly telling that the

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[20] According to Denver, when the bond projects from the 1979 DPW Report are included, the record contains evidence of approximately $180 million in DPW projects that were not subject to the goals program. Aplt. App. at 275.

[21] The record does not indicate why these DPW projects were not subject to the goals program, but Concrete Works does not dispute that this was the case. Evidently, although the 1983 Ordinance required the City to set MBE and WBE goals on the 1985 Housing Bond Project, no goals were established and funding was approved. Aplt. App. at 387.

disparity index significantly deteriorates on projects for which the city did not establish minority and gender participation goals. Insofar as Concrete Works does not attack the data on any other grounds, we consider it as persuasive evidence of underlying discrimination in the Denver construction market.

The third evidentiary item supporting Denver's contention that public discrimination existed prior to enactment of the challenged Ordinance is empirical data from 1989, generated after Denver modified its race- and gender-conscious program. In the wake of *Croson*, Denver amended its program by eliminating the minimum annual goals program for MBE and WBE participation and by requiring MBEs and WBEs to demonstrate that they had suffered from past discrimination. Aplt. App. at 312. This modification resulted in a noticeable decline in the share of DPW construction dollars awarded to MBEs. From 1985 to 1988 (prior to the 1989 modification of Denver's program), DPW construction dollars awarded to MBEs ranged from 17 to nearly 20 percent of total dollars. However, the figure dropped to 10.4 percent in 1989, after the program modifications took effect. *Id.* at 318. Like the DGS and non-goals DPW projects, this 1989 data further supports the inference that MBE and WBE utilization significantly declines after deletion of a goals program or relaxation of the minimum MBE and WBE utilization goal requirements.

Nonetheless, we must consider Denver's empirical support for its contention that public discrimination existed prior to the enactment of the Ordinance in the context of the overall DPW data, which shows consistently strong MBE and WBE utilization from 1978 to the present.

Although Denver's argument may prove persuasive at trial that the non-goals projects are the most reliable indicia of discrimination, the record on summary judgment contains two sets of data, one that gives rise to an inference of discrimination and the other that undermines such an inference. This discrepancy highlights why summary judgment was inappropriate on this record.

The uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlights why this record is not ripe for summary judgment. Although Denver's data uses as its baseline the percentage of firms in the local construction market that are MBEs and WBEs, Concrete Works argues that a more accurate indicator would consider the capacity of local MBEs and WBEs to undertake the work. *See Croson*, 488 U.S. at 501-02 ("[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities *qualified to undertake the particular task.*") (emphasis added). Concrete Works hypothesizes that, given the relatively small average size of local MBEs and WBEs, there may not have been MBEs available to perform work on DGS contracts or DPW projects on which no goals were imposed. Aplt. App. at 107-09.

We agree with the other circuits which have interpreted *Croson* impliedly to permit a municipality to rely, as does Denver, on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger's summary judgment motion or request for a preliminary injunction. *See Contractors Ass'n*, 6 F.3d at 1005

(comparing MBE participation in city contracts with the "percentage of [MBE] availability or composition in the 'population' of Philadelphia area construction firms"); *Associated Gen. Contractors*, 950 F.2d at 1414 (relying on availability data to conclude that city presented "detailed findings of prior discrimination"); *Cone Corp.*, 908 F.2d at 916 (statistical disparity between "the total percentage of minorities involved in construction and the work going to minorities" shows that "the racial classification in the County plan [was] necessary").

Nevertheless, Concrete Works has identified a legitimate factual dispute about the accuracy of Denver's data and questioned whether Denver's reliance on the percentage of MBEs and WBEs available in the marketplace overstates "the ability of MBEs or WBEs to conduct business relative to the industry as a whole because M/WBEs tend to be smaller and less experienced than non-minority-owned firms." Aplt. App. at 107. In other words, a disparity index calculated on the basis of the absolute *number* of MBEs in the local market may show greater underutilization than does data that takes into consideration the *size* of MBEs and WBEs.[22] We do not

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[22] To use an example to illustrate this point, if MBEs represent 10 percent of the total *number* of firms in the market and receive 5 percent of the total city contract dollars, the disparity index would be .5, and it could be inferred from this that discrimination exists. However, if all the MBEs were small firms averaging only one-fourth the size of the average firm in the market, then the award of 5 percent of the total city contract dollars to those MBEs could be argued not to reflect underutilization of the *capacity* of MBEs in the market to do the work because they represent only 2 1/2% of the capacity.

mean to imply that availability is not an appropriate barometer to calculate MBE and WBE utilization, nor do we cast aspersions on data that simply uses raw numbers of MBEs and WBEs compared to numbers of total firms in the market. However, once credible information about the size or capacity of the firms is introduced in the record, it becomes a factor that the court should consider.

Denver has several responses. It argues that a construction firm's precise "capacity" at a given moment in time belies quantification due to the industry's highly elastic nature. Aplt. App. at 279. Furthermore, DPW contracts represent less than 4 percent of total MBE revenues and less than 2 percent of WBE revenues in 1989, thereby strongly implying that MBE and WBE participation in DPW contracts did not render these firms incapable of concurrently undertaking additional work. Aplt. App. at 273. Denver presented evidence that most MBEs and WBEs have never participated in city contracts, "although almost all firms contacted indicated that they were interested in City work." Aplt. App. at 273, 278. Of those MBEs and WBEs who have received work from DPW, available data showed that less than 10 percent of their total revenues were from DPW contracts. *Id.*

Again, all of this back and forth argument highlights that there are genuine and material factual disputes in the record. Such disputes about the accuracy of Denver's data should not be resolved at summary judgment. *Liberty Lobby*, 477 U.S. at 249.

B. Evidence of Private Discrimination in the Denver MSA

In recognition that a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area, *Croson*, 488 U.S. at 492, we also consider data about conditions in the overall Denver MSA construction industry between 1977 and 1992. Given that DPW and DGS construction contracts represent approximately 2 percent of all construction in the Denver MSA, Denver MSA industry data sharpens the picture of local market conditions for MBEs and WBEs.

According to Denver's expert affidavits, the MBE disparity index in the Denver MSA was .44 in 1977, .26 in 1982, and .43 in 1990. Aplt. App. at 271-74. The corresponding WBE disparity indices were .46 in 1977, .30 in 1982, and .42 in 1989. *Id.* This pre-enactment evidence of the overall Denver MSA construction market – i.e. combined public and private sector utilization of MBEs and WBEs – gives rise to an inference that local prime contractors discriminated on the basis of race and gender.[23]

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[23] Post-enactment evidence contained in the record indicates that MBE and WBE underutilization persisted in 1992. A report of MBE and WBE utilization in the Denver-Boulder market completed in 1992 for the Regional Transit District ("RTD") concluded that the MBE disparity index was .08 and the WBE disparity index was .32 – evidence of continued significant statistical disparities. Aplee. Supp. at 488-90. Although this study used a "disparity ratio," which is the inverse of a disparity index, Denver converted the data to a disparity index for the convenience of comparison with earlier data. Aplee. Br. at 28.

Rather than offering any evidence in rebuttal, Concrete Works merely states that this empirical evidence does not prove that the Denver government itself discriminated against MBEs and WBEs. Concrete Works asks us to define the appropriate market as limited to contracts *with* the City and County of Denver. Such a request, however, ignores the lesson of *Croson* that a municipality may design programs to prevent tax dollars from "financ[ing] the evil of private prejudice." *Croson*, 488 U.S. at 492; *accord Contractors Ass'n*, 6 F.3d at 1002; *Coral Constr.*, 941 F.2d at 916.

What the Denver MSA data does not indicate, however, is whether there is any linkage between Denver's award of public contracts and the Denver MSA evidence of industry-wide discrimination. That is, we cannot tell whether Denver indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business or whether the private discrimination was practiced by firms who did not receive any public contracts. Neither *Croson* nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program. A plurality in *Croson* simply suggested that remedial measures could be justified upon a municipality's showing that "it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry." *Croson*, 488 U.S. at 492. Although we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of

public contracts and private discrimination, such evidence would at least enhance the municipality's factual predicate for a race- and gender-conscious program. The record before us does not explain the Denver government's role in contributing to the underutilization of MBEs and WBEs in the private construction market in the Denver MSA, and this may well be a fruitful issue to explore at trial.

C. Anecdotal Evidence

Lastly, the record contains numerous personal accounts by MBEs and WBEs, as well as prime contractors and city officials, describing discriminatory practices in the Denver construction industry. Aplt. App. at 380-90. Such anecdotal evidence was collected during public hearings in 1983 and 1988, interviews, the submission of affidavits, and case studies performed by a consulting firm that Denver employed to investigate public and private market conditions in 1990, prior to the enactment of the 1990 Ordinance.

As noted above, anecdotal evidence about minority- and women-owned contractors' experiences can bolster empirical data that gives rise to an inference of discrimination. While a factfinder should accord less weight to personal accounts of discrimination that reflect isolated incidents, anecdotal evidence of a municipality's institutional practices carry more weight due to the systemic impact that such institutional practices have on market conditions.

Here, in addition to the individual accounts of discrimination that MBEs and WBEs have encountered in the Denver MSA, City affirmative action officials explained that change orders offered a convenient means of skirting project goals by permitting what would otherwise be a new construction project (and thus subject to the MBE and WBE participation requirements) to be characterized as an extension of an existing project and thus within DGS's bailiwick. *Id.* at 387. An assistant city attorney also revealed that projects have been labelled "remodeling," as opposed to "reconstruction," because the former fall within DGS and thus were not subject to MBE and WBE goals prior to the enactment of the 1990 Ordinance. *Id.* at 386. Contrary to Concrete Works' protestations, this anecdotal evidence may be considered in conjunction with Denver's statistical analysis.

D. Summary

Given the unresolved questions of material facts identified above about the accuracy of Denver's public and private discrimination data, we conclude that summary judgment was inappropriate on this record. To be sure, Denver has compiled substantial evidence to support its contention that the Ordinance was enacted to remedy past race- and gender-based discrimination. Standing in marked contrast to the predicate facts on which Richmond unsuccessfully relied in *Croson*, Denver's evidence of discrimination both in the award of public contracts and within the overall Denver MSA is particularized and geographically targeted. We further emphasize that Denver need not negate all evidence of

non-discrimination, nor is it Denver's burden to *prove* judicially that discrimination did exist. Rather, Denver need only come forward with a "strong basis in evidence" that its Ordinance was a narrowly-tailored response to specifically identified discrimination. Then it becomes Concrete Works' burden to show that there is no such strong basis in evidence to support Denver's affirmative action legislation.

At the same time, however, our duty on summary judgment is not to resolve genuine material fact disputes between the parties. *Liberty Lobby*, 477 U.S. at 249. Concrete Works has specifically identified potential flaws in Denver's data and has put forth evidence that Denver's data fails to support an inference of either public or private discrimination. *Croson*, 488 U.S. at 493 (explaining that "searching judiciary inquiry into the justification for such race-based measure" is necessary to assure "that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool").

With respect to Denver's evidence of public discrimination, for example, overall DPW data demonstrates strong MBE and WBE utilization, yet data for isolated DPW projects and DGS contract awards suggests to the contrary. The parties offer conflicting rationales for this disparate data and the record before us does not provide a clear explanation. In addition, Concrete Works' legitimate contention that Denver's disparity indices fail to consider the relatively small size of MBEs and WBEs further impedes our ability to draw conclusions from the existing record. On remand, the parties should be permitted to develop a factual record to support their competing interpretations of the empirical data.

Our decision to reverse the district court's order and to remand for a trial in no way reflects our judgment of Denver's likelihood of success at trial on the existing factual record. Rather, we simply conclude that there are genuine issues of material fact in dispute, and thus these factual disputes must be resolved at trial. *See Contractors Ass'n*, 6 F.3d at 1007 (Philadelphia's "statistical evidence has created an inference of discrimination which the Contractors would have to rebut at trial by either proving a 'neutral explanation' for the disparity, 'showing the statistics are flawed, . . . demonstrating that the disparities shown by the statistics are not significant or actionable, . . . or presenting contrasting statistical data.' ") (internal quotations omitted); *see Coral Constr.*, 941 F.2d at 921 (reversing summary judgment in favor of municipality, and remanding for trial, to permit the challenger to rebut the municipality's statistical evidence offered in support of its MBE program).

V. Conclusion

Accordingly, we REVERSE and REMAND for further proceedings.[24]

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[24] Because Concrete Works does not challenge the district court's conclusion with respect to the second prong of *Croson*'s strict scrutiny standard – i.e. that the Ordinance is narrowly tailored to remedy past and present discrimination – we need not address this issue. The summary allegation in amici's brief that the Ordinance is not narrowly tailored does not suffice to preserve this issue on appeal.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92-F-21

CONCRETE WORKS OF COLORADO, INC., a Colorado corporation,
Plaintiff,

v.

THE CITY AND COUNTY OF DENVER, COLORADO, a municipal corporation,
Defendant.

ORDER REGARDING MOTION FOR SUMMARY JUDGMENT

(Filed Feb. 26, 1993)

Sherman G. Finesilver, Chief Judge

This is a case involving a constitutional challenge to a local ordinance regarding women and minority business enterprises. The ordinance in question deals with city-funded public works projects. The instant matter comes before the Court on the motion of Defendant City and County of Denver ("Denver" or "the City") for summary judgment under Fed. R. Civ. P. 56. Jurisdiction is based on 28 U.S.C.A. §§ 1331 and 1343(a)(3) and (4). The parties have fully briefed the matter and an oral argument was held on December 8, 1992. For the reasons stated below, including our belief that the ordinance in question does not establish a quota, the motion is GRANTED.

Summary

The Court finds that the ordinance in this case is a modest, flexible, and historically supportable response to what the Denver City Council reasonably believed to be discrimination in contracting. Far from establishing quotas or set-asides, the ordinance establishes, at most, nonbinding, good-faith aspirational goals to encourage participation of minority subcontractors in public works projects funded by the City of Denver. We find the ordinance responds to a compelling and established governmental interest. The evidence upon which it is based is an exhaustive compilation of federal studies, anecdotal evidence, independent analyses, city council hearings, census data, and statistical studies on which any city council could reasonably rely to infer the presence of discrimination.

The ordinance is also narrowly tailored to address the problem of discrimination in city contracting. It follows and joins many race- and gender-neutral efforts by the City of Denver to alleviate the problem. No minority or woman is preferred for a contract on the basis of being a minority or woman, rather, all prime contractors are subject to the same race-neutral requirement that they show good faith efforts to solicit bids from subcontractors owned and controlled by minorities and women. It is not necessary that those good faith efforts succeed, and there are numerous waivers through which prime contractors may avoid the provisions of the ordinance. The City and County of Denver sets goals in only a small portion of contracts, in a flexible consideration of numerous factors, on a project-by-project basis, and rarely reaches even the

goals it sets. The ordinance is therefore a constitutionally permissible means of affirmative action.

I. Background

On September 4, 1990, the Denver City Council ("the Council") enacted Ordinance No. 513, Series of 1990 ("the Ordinance"). Denver, Co., Rev. Mun. Code ch. 28, art. III, § 28-31 *et seq.* The Ordinance states that its aim is to undertake limited remedial activities which will help certified racial minority- ("MBE") and women-owned ("WBE") business enterprises to participate in the awarding of contracts for City-funded public works projects. *Id.* § 28-53. The Ordinance includes as racial minorities persons of Black, Hispanic, Asian-American, or American Indian descent. *Id.* § 28-54(16). In order to be certified as an MBE or WBE (collectively, "a W/MBE"), a business must: (1) be 51% owned by one or more eligible racial minorities or women; (2) be managed and controlled by the minority or woman seeking certification; (3) credibly demonstrate by written documentation or affidavit that it has suffered from past racial or gender discrimination in the Denver construction industry;[1] (4) have been in business for at least three months; and (5) not exceed certain annual revenue or receipt levels. *Id.* §§ 28-73, 28-74.

The Ordinance provides for the Director of the Office of Contract Compliance ("OCC") to set goals for the level

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[1] However, the Ordinance also provides a rebuttable presumption of past discrimination to any "MBE, WBE, woman or minority" that conducted or attempted to conduct business in the Denver construction industry prior to June 1, 1990. *Id.* § 28-73(c).

of W/MBE participation in construction contracts. The maximum allowable goal for MBE participation as a percent of annual construction dollars spent is 16%; the goal for WBEs is 12%. The maximum allowable goal for both MBE and WBE participation as a percent of dollars spent on professional design services is 10%. *Id.* § 28-55. The OCC is required to set the participation goals on a project-by-project basis depending upon the availability and capacity of W/MBEs with respect to each project. *Id.* § 28-56.

Once the goals are set for a project, all bidders, including MBEs, WBEs, noncertified minority- and woman-owned businesses, and nonminority-owned businesses, are required either to satisfy the project goals in one of several ways or to demonstrate good faith efforts to meet the project goals. Project goals can be partially satisfied by (1) the "commercially useful function" of work if the bidder is an MBE or WBE; (2) the commercially useful function of work in which the bidder forms a joint venture with an MBE or WBE; and (3) the bidder's use of MBEs or WBEs as subcontractors. *Id.* § 28-57.

Section 28-58 states that "[i]f the bidder has not fully met the project goals as required in section 28-57, then the bidder shall demonstrate that it has made good-faith efforts to meet the goals." *Id.* § 28-58. A bidder who fails to satisfy the project goals must establish good-faith efforts toward doing so by furnishing a statement in which the bidder details its compliance with numerous

good-faith requirements.[2] If the OCC determines that the bidder has not fully complied with the requirements to make good faith efforts to obtain W/MBE participation

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[2] The requirements to establish good faith are: (1) a showing of knowledge of any information provided at pre-bid meetings designed to inform W/MBEs of subcontracting opportunities; (2) verification of advertisements soliciting bids from MBEs and WBEs for three consecutive days in general or construction-related publications; (3) verification of efforts to contact by timely written notice all appropriate WBEs or MBEs within identified subcontracting categories; (4) verification of efforts to subcontract, according to industry practice, with the WBEs and MBEs whom the bidder has contacted or who have contacted the bidder; (5) verification that the bidder attempted to recruit WBEs and MBEs from at least the same geographic area from which it attempted to recruit other subcontractors and other members of a joint venture; (6) verification that, consistent with industry practice, the bidder gave WBEs and MBEs necessary access to and adequate time to review all necessary project plans as well as adequate time to prepare subcontract bids or negotiate joint ventures; (7) verification that, reasonably consistent with industry practice and the bidder's past practice on similar projects, the bidder selected portions of the work to be performed by WBEs and MBEs in order to achieve the project goals, including consideration of structuring the contract into economically feasible units to facilitate meaningful MBE and WBE participation as subcontractors or suppliers; (8) for each WBE and MBE who contacted the bidder or whom the bidder contacted or attempted to subcontract with, consistent with industry practice, a statement giving the reasons why the bidder and the WBE or MBE did not succeed in reaching a subcontracting or joint venture agreement; (9) verification that the bidder rejected WBEs and MBEs because they did not submit the lowest bid or were not qualified (i.e., having the financial ability, skill, experience, and access to the necessary staff, facilities, and equipment to complete contracts or subcontracts, *Id.* § 28-54); and (10) verification that the bidder made efforts to assist WBEs and MBEs in obtaining bonds if any are required. *Id.* § 28-58.

and to provide documentation of those efforts, the bidder's bid will be rejected as nonresponsive. *Id.* §§ 28-58, 28-59. However, once the OCC determines that a bidder has failed to meet project goals and failed to demonstrate good-faith efforts to do so, the bidder may nevertheless request an informal meeting with the OCC Director. The bidder also has additional time to clarify or modify its good-faith efforts statement. *Id.* § 28-59(c). The Ordinance provides that if a bidder is rejected, it may seek administrative or judicial review of the OCC's decision. *Id.* § 28-33.

There are several aspects of the good-faith requirements and goals that deserve special mention. First, a bidder who does not enter into a contract with a qualified W/MBE that has quoted the bidder the lowest price for the subcontract work will be deemed nonresponsive. *Id.* § 28-58(9). However, a bidder is not required to use an MBE or WBE as a subcontractor if the MBE or WBE failed to submit the lowest bid or was otherwise unqualified to perform the work. Second, the Ordinance allows W/MBE prime contractors to use their own participation to meet a project's W/MBE goals, thereby potentially reducing the efforts which those prime contractors must undertake to show good faith attempts to obtain W/MBE participation.

Finally, since the enactment of the Ordinance, the City has not set goals on all projects and has met the goals it sets only part of the time. For example, in 1990, W/MBE participation goals were met on only 16 of the 48 construction contracts awarded (33%). In 1991, the first full year under the Ordinance, goals of 0% W/MBE participation were assigned to 18 of 75 contracts (24%). Higher goals were met on only 47 of 75 contracts (63%).

Overall, despite the utilization goals of 16% for MBEs and 12% for WBEs, only 12.4% MBE and 5.9% WBE utilization was attained on City construction contracts.

On January 6, 1992, Plaintiff Concrete Works brought suit for a permanent injunction against enforcement of the Ordinance, alleging that the Ordinance was unconstitutional under the U.S. and Colorado constitutions. Concrete Works claimed that the Ordinance's "preferences" or "quotas" for W/MBE participation had caused it to be refused three construction contracts. First, Concrete Works claimed that on November 8, 1991, the City rejected its bid on Project No. W75-130A, Lakewood & Dry Gulch Storm Drainage Improvements – Phase One ("Lakewood & Dry Gulch Project") for failure to comply with either the project W/MBE participation goals or good-faith efforts. Concrete Works claimed that although its bid of $2,007,822 was the lowest bid, the City contracted with a bidder whose bid was approximately $25,000 higher than Concrete Works'.

Second, Concrete Works claims that for similar reasons, on October 28, 1991, the City rejected as nonresponsive its bid on Project No. 91-205, Colorado Boulevard Median Improvements ("Colorado Boulevard Project"). Concrete Works claimed on information and belief that the City intended to award the contract to the third-lowest bidder, Valley Crest Landscape, whose bid was $207,000 higher than the $799,955 of Concrete Works.

Finally, Concrete Works alleges that the City rejected its bid on Project No. 89-396B1, B4, and B7, Sixth and Josephine Improvements ("Sixth Avenue Project") for the same failure to comply with the good-faith requirements

of the Ordinance. The contract was awarded to the second-lowest bidder, MBE Technology Constructors. Concrete Works challenged the City's determination of its nonresponsiveness in an administrative hearing under the Ordinance, but the determination was affirmed. Concrete Works claimed that it lost the contract because, unlike the MBE that won the contract, it was not able to count its own work toward fulfillment of the project goals or good-faith requirements.

II. Standing

A party possesses standing to sue if he or she has personally suffered some actual or threatened injury that is fairly traceable to the challenged conduct and likely to be redressed by a favorable decision. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982); *Riggs v. City of Albuquerque*, 916 F.2d 582, 584 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 1623 (1991). The actual injury requirement may be satisfied by the economic losses a business suffers due to the application of a government rule. *Mountain States Legal Foundation v. Costle*, 630 F.2d 754, 764 (10th Cir. 1980). A denial of an opportunity to compete for government contracts on an equal basis with members of statutorily favored groups also satisfies the actual injury requirement. *Cunico v. Pueblo School Dist. No. 60*, 917 F.2d 431, 441 (10th Cir. 1990). The party challenging a law or ordinance has the burden of persuasion of showing that it has standing. Whether a party possesses standing is a question of law for the district court to determine. *Motive Parts Warehouse v. Facet Enterprises*, 774 F.2d 380, 389 (10th Cir. 1985).

In order to prosecute a constitutional claim, the injury requirement must be met by a showing that the plaintiff has suffered or is likely to suffer a deprivation of a constitutional right. *Cone Corporation v. Florida Dept. of Transportation*, 921 F.2d 1190 (11th Cir. 1991), *cert. denied*, 111 S.Ct. 2238 (1991) ("*Cone Corp.*"). A determination of whether a party has been so injured necessarily involves an inquiry into the merits of the plaintiff's claims. *Id.* at 1204, n.45. In order to determine whether Concrete Works has standing, the Court must decide whether there is any basis for Concrete Works' allegation that it has been deprived of equal protection by reason of race or gender.[3]

It is undisputed that City contracts are awarded to the lowest responsive bidder, regardless of race or gender. Significantly, Concrete Works has never been refused a contract *because* it is a nonminority contractor; all of Concrete Works' failures are directly attributable to its failure to *respond* to, or fulfill, the good faith requirements. Concrete Works' challenge therefore would be more accurately framed as an attack on the requirement of "responsiveness," rather than through allegations of a racial or gender preference in the awarding of contracts.

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[3] All six of plaintiff's claims, including claims based on 42 U.S.C.A. § 1981 and the Colorado Constitution, are co-extensive with the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *See, e.g., Setser v. Novack Investment Co.*, 657 F.2d 962, 966-67 (8th Cir. 1981), *cert. denied*, 454 U.S. 1064 (1981); *Valentine v. Smith*, 654 F.2d 503, 512 (8th Cir. 1981); *Local Union No. 35 of the International Brotherhood of Electrical Workers v. City of Hartford*, 625 F.2d 416, 425 (2nd Cir. 1980), *cert. denied*, 453 U.S. 913 (1981); *Collier v. Krane*, 763 F. Supp. 473, 475 (D. Colo. 1991); *Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1014 (Colo. 1982)

Absent some injury, we see no racial classification or preference *regarding prime contractors* in the requirement that contractors be responsive, or solicit bids from certain types of subcontractors. That those subcontractors are to be minorities is of no import where the party seeking standing has alleged no injury attributable to a preference accorded minority subcontractors. *Cf. Harrison & Burrowes Bridge Constructors v. Cuomo,* 743 F. Supp. 977 (N.D.N.Y. 1990) (finding monetary losses and threatening letters from state officials constituted injury due to minority participation program). The identity of the prime contractors and any burdens alleged to have been placed upon them must be analytically distinguished from the identity of the subcontractors and any measures required to be taken, by all contractors, on their behalf. Whether a nonminority prime contractor is merely encouraged to contact minority subcontractors is an entirely different question from whether a nonminority prime contractor suffers a unique detriment due to a preference accorded a minority. This latter question is what we shall now examine.

Concrete Works has not established that it was refused a contract because of the race or gender of its owner. In Concrete Works' three examples of discrimination, Concrete Works failed to win each particular contract solely because it failed to comply with the good-faith requirements. Concrete Works does not allege that the prime contractors who ultimately won the contracts on the Lakewood & Dry Gulch and Colorado Boulevard Projects were even WBEs or MBEs; indeed, Denver contends that both prime contractors were owned by white males. Concrete Works does point with specificity to the

Sixth Avenue Project as evidence that it was discriminated against when the City awarded the project to an MBE which came in second in the bidding. However, Concrete Works failed to show good faith efforts in its bid for the Sixth Avenue project. Under the Ordinance, it is clear that a contracting firm owned by white males could have also won the contract from Concrete Works merely by showing good faith or by meeting the project goals. We do not believe that Concrete Works has lost a contract due to a racial preference, but rather because Concrete Works failed to carry out the same race- and gender-neutral requirements applicable to all contractors.

Furthermore, although Concrete Works claims to have lost three contracts due to the requirements of the Ordinance, Concrete Works won at least one contract, Project No. W90-297, despite attaining 0% MBE participation in the face of an MBE project goal of 15%. Concrete Works won another contract, Project No. 85-112A, even though it was not the lowest bidder because the lowest bidder failed to comply with the Ordinance. Concrete Works won the contract because it succeeded in showing good faith efforts. In our view, Concrete Works' success in obtaining the contract due solely to its good faith efforts to involve W/MBE participants cannot be said to have conferred a racial preference on Concrete Works. Similarly, Concrete Works' failure to win other contracts cannot be ascribed to the fact that the company is owned by a white male. "The appropriate test is 'but for': But for the plaintiff's race, or gender, would he have been disadvantaged by the challenged statute?" *Contractors Association of Eastern Pennsylvania v. Philadelphia*, 945 F.2d 1260 (3d Cir. 1991) (Higginbotham, J., concurring); *see also Los*

Angeles, Dept. of Water & Power v. Manhart, 435 U.S. 702, 711 (1978). The minority status of the MBE contractor who prevailed over Concrete Works was not the but for cause of Concrete Works' rejection.

However, Concrete Works also claims that the ability of W/MBEs to use their own work in satisfaction of the project goals gives the W/MBEs an unfair competitive advantage. Denver maintains that the Ordinance contains no requirement that a contractor must meet the *project goals* in order to be deemed the lowest responsive bidder; W/MBEs and nonminority contractors alike have two routes of compliance open to them, each equally valid in establishing responsiveness: meet the goals *or show good faith*. Therefore, a nonminority contractor which established its good faith efforts would be on equal footing, if the bid amounts were equal, with a WBE or MBE that partially used its own work to meet project goals. In other words, nonminority contractors may be deemed responsive under race- and gender-neutral means of establishing good faith. There is some force to this argument.

Still, it is clear that nonminority prime contractors have open to them fewer avenues by which to achieve a determination of their responsiveness. Non-minority prime contractors arguably suffer some slight injury due to their inability to use their own efforts in fulfilling one of the two avenues leading toward responsiveness. Although we believe Concrete Works' arguments for standing to be extraordinarily weak, *cf. Associated General Contractors of California v. Coalition for Economic Equity*, 950 F.2d 1401, 1407 ("*AGCC II*") (five percent bid preference created objectively unequal bidding process and the resulting uneven playing field is a legally cognizable

injury); *O'Donnell Construction Co. v. District of Columbia*, 762 F. Supp. 354, 362 (D.D.C. 1991) (inability to compete for all of district's contracts instead of merely a specified percentage constituted injury), we note that the issue of standing in this case is so closely tied to the merits of Concrete Works' claim that we feel compelled to grant standing and proceed to evaluate Concrete Works' claim on the merits.

III. Summary Judgment Standard

Granting summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Ash Creek Mining Co. v. Lujan*, 934 F.2d 240, 242 (10th Cir. 1991); *Metz v. United States*, 933 F.2d 802, 804 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 416 (1991); *Continental Casualty Co. v. P.D.C., Inc.*, 931 F.2d 1429, 1430 (10th Cir. 1991). A genuine issue of material fact exists only where "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Merrick v. Northern Natural Gas Co.*, 911 F.2d 426, 429 (10th Cir. 1990). Only disputes over facts that might affect the outcome of the case will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Allen v. Dayco Prods., Inc.*, 758 F. Supp. 630, 631 (D. Colo. 1990).

In reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the party opposing the motion. *Newport Steel Corp. v. Thompson*, 757 F. Supp. 1152, 1155 (D. Colo. 1990). All doubts must be resolved in favor of the existence of

triable issues of fact. *Boren v. Southwestern Bell Tel. Co.*, 933 F.2d 891, 892 (10th Cir. 1991); *Mountain Fuel Supply v. Reliance Ins. Co.*, 933 F.2d 882, 889 (10th Cir. 1991).

In a motion for summary judgment, the moving party's initial burden is slight. In *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), the Supreme Court held that the language of rule 56(c) does not require the moving party to show an absence of issues of material fact in order to be awarded summary judgment. Rule 56 does not require the movant to negate the opponent's claim. *Id.* at 323. The moving party must allege an absence of evidence to support the opposing party's case and identify supporting portions of the record. *Id.*

Once the movant has made an initial showing, the burden of going forward shifts to the opposing party. The nonmovant must establish that there are issues of material fact to be determined. *Id.* at 322-23. The nonmovant must go beyond the pleadings and designate specific facts showing genuine issues for trial on every element challenged by the motion. *Tillett v. Lujan*, 931 F.2d 636, 639 (10th Cir. 1991). Conclusory allegations will not establish issues of fact sufficient to defeat summary judgment. *McVay v. Western Plains Serv. Corp.*, 823 F.2d 1395, 1398 (10th Cir. 1987).

In reviewing the evidence submitted, the court should grant summary judgment only when there is clearly no issue of material fact remaining. In *Anderson*, 477 U.S. at 249-50, the Court held that summary judgment should be granted if the pretrial evidence is merely colorable or is not significantly probative. In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the

Court held that summary judgment is appropriate when the trial judge can conclude that no reasonable trier of fact could find for the nonmovant on the basis of evidence presented in the motion and the response. *Id.* at 587.

IV. Constitutionality

A. Standard of Review

The Ordinance provides modest affirmative action for both women and racial minorities. While courts must apply intermediate scrutiny to gender-conscious legislative enactments, *see, e.g., Coral Construction v. King County*, 941 F.2d 910, 930-31 (9th Cir. 1991), an ordinance surpasses or fails constitutional standards in light of the most stringent applicable level of scrutiny. In *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Supreme Court decided that all race-conscious classifications, including those that appear to be facially benign, are subject to strict scrutiny. 488 U.S. at 493 (plurality); *id.* at 520 (Scalia, J., concurring). Numerous circuit courts have similarly interpreted the majority and numerous concurring opinions within *Croson*. *See, e.g., O'Donnell*, 963 F.2d 420 (strict scrutiny applicable to 35% set-aside for minority contracts); *AGCC II*, 950 F.2d at 1412 (strict scrutiny used to "smoke out" illegitimate use of race); *Coral Construction*, 941 F.2d at 915-16 (racial classifications subject to strict scrutiny); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 913 (11th Cir.) ("*Hillsborough*") ("When reviewing the constitutionality of [an MBE], courts apply strict scrutiny"), *cert. denied*, 498 U.S. 983; *Cunico*, 917 F.2d 431 (applying strict scrutiny to a minority preference against lay-offs).

Because the most stringent level of scrutiny possible is that used in race-conscious remedial programs, we will analyze the Ordinance as if it set goals only for participation by racial minorities.

Denver argues that the cases calling for strict scrutiny do not control our decision on the constitutionality of the Ordinance. Unlike the ordinances and policies in all of the above cases, the Ordinance before us is not a "race-conscious classification." It is not a racial preference, quota, or even a variable set-aside; it is merely a vehicle to encourage nondiscrimination in the awarding of contracts. No minority or woman is preferred for a contract on the basis of being a minority or woman, rather, *all* prime contractors are subject to the same *race-neutral* requirement that they show good faith efforts to solicit bids from subcontractors owned and controlled by minorities and women. It is not necessary that those good faith efforts succeed.

We note that the Ordinance as written and as put into effect creates only goals for minority participation, and lest it be said that 'goals' is used here euphemistically, we note that it is undisputed that the City and County of Denver sets goals in only a small portion of contracts and rarely reaches the goals it sets. Moreover, the goals are flexibly set in the first instance: in setting the goals, the OCC considers numerous factors not based upon race, gender, or even price. This is a new twist on the multitude of W/MBE programs that were created in the wake of *Croson*. There is a strong argument that because the Ordinance "merely sets goals and requires no action on the part of the City, [it] does not create any rights on the part of minority firms or any responsibilities owed those

firms by the City [and that the goals] provision, on its face, therefore, does not trigger strict scrutiny, in contrast to the Richmond Plan considered in *Croson*." *Contractors Association*, 945 F.2d at 1269 (Higginbotham, J., concurring).

The District Court for the Middle District of Pennsylvania similarly observed, in examining city policies almost identical, in relevant respects, to the Ordinance:

> [t]he policies do not require use of certain percentages of women and minorities but, rather, seek to ensure no *current discrimination*. The policies are screening devices as opposed to a classification based on whether prime contractors meet certain quotas for awards to minority and women contractors. Having taken the position that the policy statements create no quota or goal system, the court finds that strict scrutiny does not apply. Rather, the rational basis test applies.

Associated Pennsylvania Constructors v. Jannetta, 738 F. Supp. 891, 893 (M.D.Pa. 1990) (emphasis in original).

The parties do not dispute that Concrete Works' rejected bids were appropriately deemed nonresponsive because they did not comply with the good faith criteria of the Ordinance. Concrete Works has not and cannot deny that it was refused certain contracts only because it failed to comply with the good faith requirement, and not because the ultimate winner was preferred on the basis of its race. In fact, under the Ordinance, nonminority contractors could lose contracts to other nonminority contractors solely because the winning contractors complied with the good faith requirements. Indeed, under the same

facts, any entities not in compliance with the ordinance, even those qualifying as WBEs or MBEs, are deemed nonresponsive and accordingly denied the contract. The cause for Concrete Works' failure to be awarded the contracts, therefore, was its failure to comply with criteria which granted no benefit based upon racial preference (i.e., no affirmative action quota or set-aside), but rather *required only an accounting* of efforts made to solicit diverse participation. This accounting cannot be equated with a classification.

However, though we find these arguments persuasive and view the rational basis test as the appropriate standard of review, we feel compelled by *Croson* to apply strict scrutiny to all programs with even a remote racial affirmative action bent. It is clear that although the Ordinance requires only an accounting of good faith efforts, it does require that accounting only with regard to groups classified by race. We also refer, once again, to the ability, overstated by Concrete Works, of W/MBE prime contractors to use their own work in satisfying the City's goals. Although we believe that any affirmative action program which essentially forbids a beneficiary from accepting its benefits would be a meaningless program, it appears that by employing the "race-conscious" standard, the *Croson* Court meant for strict scrutiny to be applied to nearly all affirmative action. Strict scrutiny requires that a classification found to be based on race must serve a compelling state interest and must be narrowly tailored to further that interest. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986).

B. Compelling Interest

In *Croson*, the Supreme Court outlined the scope of discrimination that a race-conscious remedy could properly seek to redress. The Court held that governmental entities have a compelling interest in redressing both discrimination by the governmental entity and by private parties within the entity's legislative jurisdiction, so long as the municipality had somehow perpetuated the discrimination targeted by its program. *See* 488 U.S. at 491-92 (Rehnquist, C.J., White, J., O'Connor, J.); *id.* at 537-38 (Brennan, J., Marshall, J., Blackmun, J.). In order to satisfy this requirement, it is enough for the City to show that it was a "passive participant" in the discrimination, rather than that it actively perpetrated such discrimination. *Id.* at 492 (Rehnquist, C.J., White, J., O'Connor, J.); *Coalition*, 950 F.2d at 1413; *Coral Construction*, 941 F.2d at 916. In addition, the mere desire to prevent an infusion of tax dollars into a discriminatory industry may be sufficient to satisfy this requirement. *Croson*, 488 U.S. at 492 ("It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.").

In assessing whether a municipality's legislative body has established a compelling interest in a W/MBE plan, a court must examine the factual predicate justifying the necessity of such a plan. *Id.* at 500. The adequacy of the factual predicate is a question of law. *Associated General Contractors of Connecticut v. City of New Haven*, 791 F. Supp. 941 (D. Conn. 1992). The predicate required for a race-conscious program is the existence of a systematic pattern of race-based exclusion in city construction.

Croson, 488 U.S. at 509. The municipality's findings must have provided it with a " 'strong basis in evidence for its conclusion that remedial action was necessary.' " *Id.* at 500, *quoting Wygant*, 476 U.S. at 277 (plurality). However, the municipality need not "convinc[e] the court of its liability for prior unlawful discrimination; nor does it mean that the court must make an actual finding of prior discrimination based on the [municipality's] proof before the [municipality's] affirmative action plan will be upheld." *Id.* at 292. Finally, while a municipality has the burden in establishing an adequate factual predicate, the burden then shifts to the challenging party to show that the evidence relied upon by the municipality will not support even an inference of discrimination.

1. Adequate Factual Predicate

In examining the factual predicate alleged by the City as the basis for the Ordinance, we begin by summarizing what sort and amount of evidence has been held insufficient. In *Croson*, the Court found unpersuasive the City of Richmond's mere recital of a remedial basis for its set-aside plan. *Id.*, 488 U.S. at 500. It criticized as not probative Richmond's statement that discrimination existed in the construction industry generally, as opposed to Richmond specifically. *Id.* at 498. It criticized as statistically flawed Richmond's assertion of a disparity between the percentage of contracts awarded to MBEs and the percentage of minorities in the city as a whole. *Id.* at 501-02.

And it rejected as lacking specificity the city's reliance on Congress' finding of discrimination in the national construction industry. *Id.* at 504.

Likewise, the Circuit Court in *O'Donnell* agreed that the District of Columbia's "observation about society-wide discrimination, regardless of its truth," could not be relied on to enact a racial preference. The Court held "constitutionally meaningless" various statistically flawed statistics: the statistics lacked specificity, used an overly small sample size, covered only one year's worth of contracts, did not show discrimination in the District of Columbia's construction industry, and did not discern among qualified and unqualified MBEs. 963 F.2d at 425-26.

Finally, the District Court for the District of Connecticut held that sparse anecdotal evidence gathered by the City of New Haven was insufficient to establish a factual predicate for its MBE set-aside. *New Haven*, 791 F. Supp. at 947. *See also International Bhd. of Teamsters v. U.S.*, 431 U.S. 324 (1977); *Coral Construction*, 941 F.2d at 919 ("anecdotal evidence may suffice to prove individual claims of discrimination [but] rarely, if ever, can such evidence show a systematic pattern of discrimination necessary for the adoption of an affirmative action plan"). In *New Haven*, the city came up with only fifteen anecdotal examples of discrimination, many of which had to do with employment discrimination generally, rather than discrimination in the construction industry in particular.

In determining that a factual predicate existed for racial discrimination in the relevant construction industry, the Denver City Council relied on a combination of

statistical and anecdotal evidence, from general evidence in the late 1970s to more detailed findings in the years up to the present. The evidence goes far beyond the evidence found inadequate in *Croson*. It is a compilation of federal studies, anecdotal responses, independent analyses, city council hearings, census data, and statistical evidence on which any city council could reasonably rely to find a compelling governmental interest.

General Evidence. In 1977, Congress determined[4] that there was widespread discrimination in the national construction industry and in public contracting and that minority businesses were receiving less than 1% of the dollar amount of federally funded contracts. *See Fullilove v. Klutznick*, 448 U.S. 448 (1980). In the same year, at Denver's Stapleton International Airport ("Stapleton"), minority businesses received 0% of the construction projects. No equivalent statistics were kept for women. Def. Mot. for Summ. J., Exh. E. In 1978, an investigation by the General Accounting Office revealed discrimination by Denver and the Department of Public Works. *Id.*, Exh. B, § V-1. In 1979, the Acting Director of Civil Rights for the Department of Transportation asserted that Denver was not in compliance with Title VI of the Civil Rights Act of

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[4] We note that findings of discrimination in the Denver area, whether by Congress or by federal agencies, are not without probative value. First, Croson merely stated that cities could not rely on such evidence, not that it was without value. Second and most importantly, *Croson* did not forbid state and local legislators from relying on federal findings so long as such findings were *region-specific*. *See generally* Charlotte F. Westerhaus, *Resurrecting State and Local Race Conscious Set-Aside Programs*, 67 Ind. L.J. 169 (Winter 1991).

1964 and other federal laws and threatened to withhold federal financial assistance for Stapleton. *Id.*, Exh. F.

Beginning in the early 1980s, the evidence became more specifically focused upon Denver's own construction industry. In 1981, in the face of continuing federal pressure, the City began an administrative goals program for City-funded construction and design contracts at Stapleton.[5] The City Council then began investigating discrimination on City-funded construction projects. Only a fraction of the many studies, reports, and collections of anecdotal responses are summarized below.

1981 Peat, Marwick, Mitchell & Co. Study. In 1981, the City commissioned a study of the City's contracting procedures, including prequalification and allowed bid response time, and examined their impact on minority and nonminority construction companies. The authors of the study found that certain City procedures negatively affected the ability of minority construction companies to compete for City projects. The study rejected bonding requirements as potential barriers for minority businesses. *Id.*, Exh. B, § V-4.

1979 Department of Public Works Major Bond Projects Report. In 1979, a DPW report determined as virtually nonexistent the use of minority and woman owned businesses on City projects funded by City bonds in 1972, 1974, 1975, and 1976. The DPW report revealed an even

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[5] Prior to the federal government's intervention, minority-owned contractor utilization at Stapleton for the years 1977-1980 was 0%, 3.8%, .7%, and 2.1%, respectively. No figures were kept for woman-owned contractors until 1980, when the rate of utilization was .05%. *Id.*, Exh. E.

greater statistical disparity in the use of minority and woman owned businesses on locally funded projects than on federally funded projects. *Id.*, pp. 5-7.

1977 & 1982 U.S. Census Data on Size and Rate of Formation of W/MBEs. U.S. Census Data for 1977 for firms with payrolls show that minority and women-owned construction firms had 57% of the average number of employees for all construction firms in the Denver MSA. W/MBEs averaged less than half the average gross receipts for all firms in that year. Analysis of the same statistics in 1982 yielded similar results. Other research found the rate of business formation for W/MBEs to be lower than for nonminority firms.

1983 City Council Hearing. On March 30, 1983, the City Council held a public hearing regarding such discrimination and the possible need for appropriate legislation. Of 21 citizens who commented on the need for legislation, an unspecified number of people spoke out in favor, providing examples of discrimination in city contracting, while an unknown number of persons spoke out against any such legislation. In May of the same year, the City enacted Ordinance No. 246, Series of 1983, to extend the Stapleton administrative goals program to projects outside of Stapleton. However, the program put in place by the 1983 ordinance still excluded from its scope all city departments other than DPW, and from 1986 to 1989 about one-third of all Denver construction dollars fell outside the scope of the goals program. *Id.*, pp. 4-5.

1988 DPW and City Council Hearings. In March 1988, DPW conducted numerous hearings on the effectiveness of the administrative goals program and the

necessity of continuing it. While some individuals stated that discrimination in the Denver construction industry was nonexistent or less than the City alleged, others provided anecdotal evidence of racial and gender discrimination. The Acting Deputy Manager of DPW prepared a written report concluding the evidence submitted furnished a "clear indication" discriminatory practices persisted and the entire goals program should be continued. *Id.*, § V-8, § VI-6.

On June 13, 1988, the City Council held its own hearing regarding the enactment of a new ordinance. Following a hearing at which 49 citizens spoke, the City Council made extensive findings and enacted Ordinance 424, Series of 1988, later amended by Ordinance 213, Series of 1989. *Id.*, § V-10, § VI-10.

Certification Applications. After *Croson*, the City required that all W/MBEs submit a new application for certification as W/MBEs and that they include a statement of discrimination. Responses to the applications provide example after example of racist and sexist slurs and stereotypes, discrimination in solicitation and acceptance of bids, bid-shopping, and supplier relations. *Id.*, Exh. B, § VII-9 & App. D.[6]

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[6] One respondent reported being told by the presidents of two contracting companies not to use an Hispanic surname in the name of the firm because it "would reflect a stereotype that Hispanic people are lazy, slow and not concerned with quality of work or productivity." Another reported being asked, "What is a woman doing in this field?" A third was told by nonminority prime contractors that "where there were no Affirmative Action Goals . . . they did not have to use us. They would only contact us on projects where the city had set a goal." A

1990 Denver Disparity Study. A study of discrimination prepared for the City and County of Denver examined all of the foregoing evidence and analyzed other information for the first time. For example, the study team investigated $180 million worth of general obligation bond fund projects and the extent to which W/MBEs participated in bond projects for which there were no goals. The study team determined the disparity ratios (utilization divided by capacity) for several bond projects, including bond projects for the period 1972-1976, a 1985 Museum of Natural History bond project, and 1985 housing bond projects.[7] In every case, for both WBEs and MBEs, the resulting disparity ratios were significantly less than 1.0, indicating that statistical disparities existed between W/MBE capacity and utilization. The study team concluded that majority contractors refused to contract with W/MBEs unless required to do so under a goals program, and that in the twelve months following the enactment of Ordinance No. 213, which relaxed MBE

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woman and her daughter are often told, "No thanks, sweetie, I need to talk to one of the guys." Contractors often call up and refuse to talk to the women and demand to talk to the older woman's son, who lives in California. One WBE reported that contractors had asked that the WBE remove women from the job site. Another reported hearing a man say there was not one qualified woman- or minority-owned surveying firm in the State of Colorado and that he resented giving up his fees to satisfy the participation goals. Many firms owned by women and minorities reported that their bids, even when low, received only cursory attention. Some report that their lowest bids were rejected without explanation.

[7] On the Museum and 1985 bond projects, both WBE and MBE utilization were well under two percent on every project. *Id.*, Exh. B, § VIII.

utilization requirements, there was a substantial decrease in MBE utilization.

The study team also interviewed 38 W/MBEs in the construction and professional design industries. The study team reported that while some of the persons contacted did not believe that they had been discriminated against, many others did, and cited specific anecdotal instances of discrimination.[8] The study team reported more anecdotal evidence of discrimination when it interviewed representatives from 31 firms of diverse composition and conducted "interviews with knowledgeable persons." After reviewing the compliance efforts of Denver's Affirmative Action Office, the study team concluded that private nonminority contractors and even some City officials have attempted to circumvent the affirmative action requirements. *Id.*, Exh. B, § VI & App. D-10. First, the study team investigated reports that a substantial number of construction and design contracts were not subject to the goals programs because they were improperly routed through the Department of General Services, which is not subject to the goals provisions and the team described the means by which the City's departments avoided the goals programs. Second, the study team noted evidence that nonminority contractors sometimes called WBEs the day before a bid was due, even

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[8] Some examples include a WBE owner who was told by the vice president of a company: "I have to warn you, my dad doesn't like working with women." She was informed by a male loan officer that his daughter, a secretary, made more money than she. She reported comments from men in the local construction and design industries such as "How can a little gal like you handle this?" and "Where is your husband?"

though one day is not enough time to prepare a bid, or called a defunct WBE, and then cited the calls as evidence of good faith.

The study team concluded that there was "strong evidence of discrimination against MBEs and WBEs in the construction industry." *Id.*, VIII-8. The team found substantial evidence of discrimination against Hispanics and also, in descending order of the amount of evidence, against blacks, Asians, and American Indians. The team concluded that the lesser number of examples for Asians and American Indians was attributable to the lesser number of firms owned by members of those groups and not to the existence of less discrimination. The team also concluded that the reason for any apparent overutilization of MBEs and WBEs was the result of the City's seven years of affirmative action goals programs; in order to control for the effects of the goals programs, the team examined pre-program evidence and concluded that in the absence of goals, the result was nearly zero W/MBE participation.

Post-Enactment Evidence. Denver has included with its motion for summary judgment and its reply some evidence of discrimination which became available only after enactment of the Ordinance, and other evidence of discrimination from the Denver Metropolitan Statistical Area ("Denver MSA") at large. The post-enactment evidence includes the 1991 Denver Disparity Study for Goods, Services, and Remodeling ("the 1991 DGS Study"), *Id.*, Exh. B-1, a summary of a 1992 report presented to the Regional Transportation District's Board of Directors ("the RTD study"), *Id.*, Exh. L., and a 1992

summary report by the U.S. Commission on Civil Rights ("Commission Report"), *Id.*, Exh. M.[9]

The 1991 Denver Disparity Study ("the DGS Study") conducted an exhaustive examination of ten major areas of procurement by Denver's Department of General Services ("DGS") and found them to be relatively free of the distorting effects of prior or current affirmative action efforts. The DGS Study examined an exhaustive body of quantitative and qualitative, or anecdotal, data. The authors of the study discovered that in 1989 and 1990, MBE disparity ratios for DGS remodeling projects were significantly less than unity, while the WBE ratio for 1989 was less than one and the ratio for 1990 greater than one. *Id.*, Exhs. B-1, VI-2 & N. The authors found statistically significant differences between W/MBEs and nonminority firms: DGS used disproportionately fewer W/MBEs than were available to handle City procurement; given the representation of minorities and women in skilled occupations – and thus in the pool of individuals most likely to form new businesses – the number of W/MBEs in the relevant industries was statistically lower than expected; W/MBEs were smaller in size than their nonminority competitors; and even controlling for employment size, W/MBE revenues were lower than the revenues of nonminority firms. *Id.*, Exh. B1, IV-4. The authors concluded that "[t]he study's findings included both quantitative and qualitative evidence sufficient to approach a prima facie case of discrimination against both MBEs and WBEs by the City itself and as a passive

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[9] Denver has not summarized or attempted to interpret the Commission Report and we decline to do so here.

participant in discrimination practiced by private industry." *Id.*, Exh. B1, § IV-23.[10]

The RTD study examined utilization of W/MBEs in the Denver-Boulder MSA by the Regional Transportation District. The study's methodology included analysis of the geographic market from which RTD drew its contractors, U.S. Census data, relative utilization in the private sector, a public hearing, personal interviews, and a survey of over 350 local minority- and woman-owned construction firms. The authors calculated disparity ratios (utilization divided by availability) that indicated statistically significant disparities in the utilization of minority- and woman-owned construction firms, and the project director stated in an affidavit that such firms had, in his opinion, experienced discrimination in the Denver-Boulder MSA. *Id.*, Exh. L-2.

Initially, the parties disagree as to the nature of evidence that may be considered by either the Court or the jurisdiction enacting race-conscious remedial measures, including statistics taken from outside the City and County of Denver's jurisdiction, that is, from the six-county Denver Metropolitan Statistical Area ("MSA"), and evidence available only after enactment of the Ordinance.

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[10] The Court recognizes that the 1991 DGS Study does not cover the general contractor industry. It is, however, of some probative value because it tends to indicate discrimination by the same city agency that awards a large portion of general contractor contracts.

2. Extrajurisdictional Evidence of Discrimination

Concrete Works argues that *Croson* forbids the City Council from using evidence of discrimination in adjoining counties outside its jurisdiction. *See Croson*, 488 U.S. at 509 (noting that "[n]othing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction"). However, we are not able to agree with Concrete Works that statistical evidence from the Denver MSA is irrelevant or improperly considered. The concern of the Court in *Croson* was that cities not be able to share the data and findings of *Congress* and thus inappropriately use a vaguely defined "societal discrimination" as the factual predicate for MBE programs. *Croson*, 488 U.S. at 497 (plurality) (observing that 'societal discrimination' is "an amorphous concept of injury that may be ageless in its reach into the past") (*quoting University of California Regents v. Bakke*, 438 U.S. 265 (1978)); *id.* at 526 (Scalia, J., concurring). The Court has explained that evidence of discrimination should be specific so that race-conscious programs are designed to minimize burdens upon nonculpable third parties. *See United States v. Paradise*, 480 U.S. 149, 183 (1987); *see also Coral Construction*, 941 F.2d at 917.

It is clear that the use of evidence of discrimination from the Denver MSA implicates none of the concerns expressed by the *Croson* Court about an "amorphous" and malleable "societal discrimination." The study team found that over 80 percent of construction and design contracts awarded by the Denver Department of Public

Works were awarded to contractors within the Denver MSA. Def. Mot. for Summ. J., Exh. B, at III-1. The evidence from the Denver MSA is relevant to the jurisdiction of Denver's contract awards, thus reducing the problem of innocent parties. In addition, the only industry data available for the Denver area has historically been data from the U.S. Census that addresses only the Denver MSA. The study team reasonably concluded that the relevant local construction industry was the Denver MSA. *See Associated General Contractors of California v. City and County of San Francisco*, 813 F.2d 922, 934 (9th Cir. 1987) ("*AGCC I*") (noting that any plan that extends race-conscious remedies beyond territorial boundaries must be based on very specific findings that actions the city has taken in the past have visited racial discrimination on such individuals).

Although Concrete Works cites *Coral Construction* for the proposition that "[t]o prevent overbreadth, the enacting jurisdiction should limit its factual inquiry to the presence of discrimination within its own boundaries," 941 F.2d at 917, Concrete Works ignores both the context in which the Court of Appeals made that statement as well as other relevant reasoning and holdings by the Court.[11] The Court rejected evidence from Pierce County,

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[11] Plaintiff also admits that the Denver MSA is the relevant area from which to determine the availability of minority and women contractors, and its expert uses U.S. Census data for the Denver MSA to establish availability of minority and women contractors in Denver. Defendant correctly notes that it is unclear how Plaintiff can admit that the Denver MSA is the appropriate area from which to determine availability in the local industry, but not also utilization.

Washington because it concluded that not all Pierce County developers and contractors would seek business in both that county and the jurisdiction at issue, King County. At the same time, the Court concluded that evidence from other jurisdictions *was* properly considered by the District Court. The Court of Appeals noted that the other jurisdictions were "either completely within or coterminous with the boundaries of King County. The data from these jurisdictions is, almost by definition, relevant to the question of discrimination within [King] County. Likewise, the risk of unfairly burdening innocent third parties is not present." *Id.* at 917. Concrete Works also overlooks the fact that the Court of Appeals found even the ultimately rejected Pierce County evidence to be probative, even though it was from a completely separate jurisdiction, because:

> It is, however, immediately adjacent to King County and is part of the same metropolitan area. Likewise, the world of contracting does not conform itself neatly to jurisdictional boundaries. In this regard, contracting differs markedly from a school system, which conducts its business in relative isolation from other school systems.

Id.

We conclude that Denver is not acting outside its jurisdiction, but is applying a policy to those contractors who have been found to choose to enter Denver's boundaries to seek work and win Denver's tax dollars.

3. Post-Enactment Evidence

Although we consider Denver's factual predicate sufficient without the post-enactment evidence, we will address Concrete Works objection to any evidence of discrimination which became available after the Ordinance was enacted.[12] Specifically, Concrete Works challenges the admissibility of the 1991 DGS Study, the RTD study, and the Commission Report. Concrete Works asserts that post-enactment evidence ought not to be considered because it is not possible to ensure that a program is remedial if the cause for the remedy is not discovered until after the remedy (here, the Ordinance) takes effect. However, it would make little sense to strike down the Ordinance *solely* because the evidence of discrimination before the City Council was insufficient without the post-enactment evidence only to watch the City Council reconvene immediately, incorporate the new evidence into a new ordinance, and arrive at a constitutionally adequate factual predicate. Practically speaking, this Court is being asked to determine the constitutionality of an Ordinance as it exists now, not an ordinance as it existed in September of 1990. The nexus between causation (i.e., discrimination) and remedy (i.e.,

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[12] We note briefly the disingenuousness of Concrete Works' attack on the post-enactment evidence when it also claims as a disputed issue of fact whether discrimination *currently* can be proven to exist or has been remedied by the ordinances in place since 1983. Brief of Plain. Resp. to Quest. of the Court, at 10; Plain. Brief in Opp. to Def. Mot. for Summ. J., at 19. Concrete Works cannot credibly maintain that Denver should be required prove the current existence of discrimination and at the same time attempt to bar the most current evidence on the matter.

the Ordinance) is most logically evaluated in light of the respective known causation and remedy as they exist at the time the nexus is challenged. Although Concrete Works' concern has considerable merit, we conclude that it makes little sense and would be highly impractical not to consider all of the available evidence on discrimination.[13] *See Coral Construction*, 941 F.2d at 920.

Such a rule recognizes the seemingly conflicting demands sometimes placed upon a state or municipality by the Constitution. *Id.* The state "has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself." *Croson*, 488 U.S. at 518 (Kennedy, J., concurring); *Coral Construction*, 941 F.2d at 920. Because of that absolute duty:

> [a] state or municipality, when presented with evidence of its own culpability in fostering or furthering race discrimination, might well be remiss if it failed to act upon such evidence. Thus, a municipality having such evidence would face the dilemma of deciding whether to

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[13] By stating that all available evidence of discrimination should be examined in order to decide the constitutionality of a remedial ordinance, we do not mean to suggest that future plaintiffs have either standing or legitimate arguments to challenge ordinances on the basis that the identified discrimination has allegedly been remedied since enactment. The courts have no power in a scheme of separation of powers to strike down the sunset provisions of constitutional ordinances and replace them with earlier expiration dates based on the Court's view of whether discrimination has been remedied.

> wait the months necessary for further development of the record, risking constitutional culpability due to its inaction, or to act and to risk liability for acting prematurely but otherwise justifiably.

Id. at 921.

While subsequent evidence may well fail to support the need for a remedial program, we cannot strike down an ordinance that a municipality enacts under the good faith belief that it has systematically discriminated in a local industry. The Ordinance cannot be invalidated now solely because it may not have met constitutional standards at the time of its enactment.[14]

4. Evaluation of the Factual Predicate

In any analysis of disparity, statisticians compare at least two bodies of data. The primary disagreement that Concrete Works has with Denver is over the propriety of the data used in the two disparity studies. Concrete Works alleges that Denver has overstated disparity by defining the local construction industry as all construction in the Denver MSA as well as by using the 'availability' of W/MBEs rather than 'capacity'.

Concrete Works' arguments and contrary data point up the danger of the courts attempting to discern whose statistics are 'more accurate' or better interpreted and,

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[14] For all of the reasons stated above, we also reject Plaintiff's contention that the Court should not consider evidence existing prior to Defendant's motion for summary judgment but not adduced until its reply.

further, regardless of the disputed validity of the statistics, whether a legislative body nevertheless believed it had a strong basis – strong enough to survive strict scrutiny – for enacting a goals policy to assist minorities and women in the construction industry. Concrete Works points out that the evidence contained in the 1990 Disparity Study "proves" there was no statistical disparity in the use of minority and woman owned businesses in *Denver public contracting*. Defining the relevant local construction industry as the industry created solely by DPW contracts, Concrete Works illustrates that W/MBEs were utilized *by DPW* at rates well above their capacities. Concrete Works bases its critique of the bond projects disparities on similar grounds.

But it cannot be doubted that a state or municipality "has the authority to eradicate the effects of *private* discrimination within its own legislative jurisdiction." *See Croson*, 488 U.S. at 491-92 (plurality) (emphasis added); *compare id.* at 518 (Kennedy, J., concurring) (noting that municipality "has the power to eradicate racial discrimination and its effects in both the public and private sectors"); *Coral Construction*, 941 F.2d at 920; *and AGCC I*, 813 F.2d at 929 *with Croson*, 488 U.S. at 524 (Scalia, J., concurring) (race-conscious remedies should be allowed only where necessary to "eliminate [its] own maintenance of a system of unlawful racial classification"). We find no merit in the implication – refuted by decades of affirmative action policies nationwide and at every level of government – that a governmental body can attempt to abolish discrimination only from within its own ranks while the same discrimination survives unchecked in the private sector. Concrete Works also ignores the influence

of affirmative action even in the utilization of W/MBEs by Denver; Denver not only established statistically that DPW and DGS discriminated against W/MBEs in the absence of goals, but has also pointed out that the existence of its affirmative action programs since the early 1980s must be expected to inflate artificially any disparity ratio near to or above unity.

Concrete Works next criticizes the use of "availability" data, rather than data on W/MBE capacity, in the City's calculation of disparity ratios. A *disparity ratio* is calculated by comparing the capacity of W/MBEs to their utilization in the industry. *Capacity,* as Concrete Works' expert economist points out, is ideally measured by the total amount of business that could be handled by MBEs. There are typically three measures used to predict the amount of business that W/MBEs can handle: the number of W/MBE companies relative to the total number in the industry (also known as 'availability'), W/MBE revenue as a percent of industry revenue, and the number of W/MBE employees as a percent of the industry total. *Utilization* is calculated by comparing the ratio of industry contracts received by MBEs relative to the total number of contracts in the industry. A utilization/capacity ratio of less than one, or unity, implies evidence of discrimination against minority-owned firms. If the disparity is determined to be statistically significant (that is, the ratio differs from unity, the expected mean, by two or more standard deviations), the result is a strong inference of discrimination not attributable to factors other than race or gender. "In cases in which the Standard Deviation Quotient is rather high, it is unlikely that factors such as lack of bonding or experience alone account for such a

large disparity." Daron S. Fitch, *The Aftermath of* Croson: *A Blueprint for a Constitutionally Permissible Minority Set-Aside Program,* 53 Ohio St. L.J. 555 (1992) (also recommending municipalities employ chi-square and multiple regression analyses in addition to standard deviation calculations).

Concrete Works argues that capacity, or the ability to handle business, is the appropriate measure of comparison, rather than availability, or the number of available firms. There are several problems with this argument. First, as evidenced both by Concrete Works' failure to suggest an alternative way to measure capacity and the admission of its expert that availability is more often used in actual practice, the ability of a firm to handle any given amount of business is exceedingly difficult to define and even more difficult to quantify. Capacity is a function of many subjective, variable factors. Second, while one might assume size reflects capacity, it does not follow that smaller firms have less capacity; most firms have the ability and desire to expand to meet demand. A firm's ability to break up a contract and subcontract its parts makes capacity virtually meaningless. Furthermore, Concrete Works does not dispute that the Denver construction market is characterized by relatively small firms and that size is therefore of even less significance. Third, to the extent that capacity can be measured, Denver did analyze statistics using all three methods – number of firms, revenue, and number of employees. Disparities existed in the proportion of W/MBE firms receiving contracts as well as in relative revenues corrected for the relatively smaller average number of W/MBE employees.[15]

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[15] The statistics bear out what may be expected in an historically discriminatory industry. Under what has been termed the "intertemporal" approach to discrimination, "any act of dis-

Finally, Concrete Works can cite no authority for its assertion that its amorphous, ambiguous conception of capacity is required. No court to date has required a comparison of a firm's 'ability to handle work.' Cf. *Wygant*, 476 U.S. at 267, 294 (when the "availability of minorities in the relevant labor pool substantially exceed[s] those hired . . . one may draw an inference of deliberate discrimination"); *AGCC II*, 950 F.2d at 1414 (disparity between the percentage of contracts awarded to MBEs and the percentage of available MBEs is "an invaluable tool" in demonstrating discrimination); *Hillsborough*, 908 F.2d at 913 (same). Concrete Works points us to the statement in *Croson* that "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." 488 U.S. at 501-02. The next paragraph of the plurality's opinion, however, approvingly makes an example of *Ohio Contractors Assn. v. Keip*, 713 F.2d 167, 171 (1983), which the Court notes upheld a minority set-aside based on "the percentage of minority *businesses* in

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crimination continues to affect its victim's productivity beyond the time when the act ceased. As long as Blacks' productivity is lower than that of whites, employers will prefer whites. Hence in any market where discrimination was prevalent in the past, current racial disparities might be explained in terms of that discrimination." Martin J. Katz, *The Economics of Discrimination: The Three Fallacies of Croson*, 100 Yale L.J. 1033 (Jan. 1991). Although it might appear that a minority contractor's size and productivity will eventually catch up to the nonminority's when the discriminatory acts cease, the time value of money effectively prevents such catching up. *Id.*

the State compared to [the] percentage of state purchasing contracts awarded to minority firms upholding [the] set-aside." *Croson*, 488 U.S. at 502 (emphasis in original).[16]

The Court's approval of methodology employing the number of firms (availability) compared to the number of contracts they receive is consistent with the logic of making out prima facie cases of individual discrimination in Title VII cases: if a sufficiently large pool of minority carpenters is systematically excluded from employment at a rate higher than chance would allow, i.e., at a statistically significant rate, then statistics allow us to isolate race as a potentially strong factor in explaining discrimination against even one individual. Moreover, in Title VII cases, a party challenging evidence of discrimination must have conducted its *own* regression analysis to show that the evidence is in fact flawed, and that correcting for any alleged flaws would have resulted in no disparities. *Allen v. Seidman*, 881 F.2d 375 (7th Cir. 1989); *Sobel v.*

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[16] Even the *Croson* Court's criticism of Richmond's statistics comparing minority contractor participation with Richmond's minority population at large is not invulnerable. The Court explained that the "dearth of minority participation" in Richmond's construction industry could have resulted from differing "black and white career entrepreneurial choices." 488 U.S. at 503. But as one commentator argues, if a lucrative market such as construction is truly competitive, "such choices could only be explained in one of two ways. Either Blacks must be less rational than whites . . . or their incentives must differ from those of whites." Because the former option would be both racist and without evidentiary basis and the latter begs the question of why the incentives differ, *Croson's* critique may deserve re-examination. *See* Katz, *Economics of Discrimination*, *supra*.

Yeshiva University, 839 F.2d 18, 34 (2d Cir. 1988) (party challenging validity of multiple regression analysis must make showing that factors it contends ought to have been included would weaken the evidence of disparity); *Palmer v. Schultz*, 815 F.2d 84, 101 (D.C. Cir. 1987) (party cannot in most cases rebut statistical evidence without introducing evidence to support contention that missing variable can explain away disparities); *Catlett v. Missouri Highway and Transp. Comm'n.*, 828 F.2d 1260 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 1574 (1988); *Segar v. Smith*, 738 F.2d 1249, 1287 (D.C. Cir. 1984); *Chicago Fire Fighters v. Washington*, 736 F. Supp. 923 (N.D. Ill. 1990); *see also* D. Baldus & J. Cole, *Statistical Proof of Discrimination*, vii (1987 Supp.) (when statistical evidence is challenged on methodological grounds, the burden should be on the challenger to present evidence that the statistics are defective and how the defect biases the results). Concrete Works has criticized portions of Denver's methodology without showing that its alleged flaws would have made a difference in the disparity ratios. It would be unfair to allow disgruntled plaintiffs to drag affirmatively acting municipalities into court on such meager rebuttal evidence.

Concrete Works also challenges Denver's interpretation of the evidence showing that minority- and women-owned firms are on average smaller and have a lower rate of formation. This disagreement once again illustrates the difficulty of haggling over statistics. We agree with Concrete Works that this evidence is not necessarily proof of discrimination in the construction industry, and that it may also be the result of the relatively short period of time W/MBEs have been in the industry, difficulties in obtaining capital, credit, and insurance, and bonding

requirements. On the other hand, while Concrete Works criticizes the business formation findings on the basis that W/MBE formation actually increased 180% during the period from 1977 to 1982, it ignores key facts. First, W/MBEs saw their revenues increase by only 95% while nonminority firms' revenue increased by 150%; second, total representation of minorities and women in the industry is still below their representation in the community; and third, once started up, W/MBE growth is still much slower and the rate of failure much higher than among nonminority firms. In fact, the disparities between W/MBE and nonminority firm revenues and employees are *higher* than the disparities calculated by using the number of firms. Def. Mot. for Summ. J., Exh. B, App. C-8.

It appears from Concrete Works' critiques of Denver's interpretation of the statistics and anecdotal evidence that Concrete Works would require a municipality affirmatively to *prove* discrimination with such a degree of statistical certainty that no statistician could disagree. We do not believe that *Croson* requires such an onerous, perhaps impossible, burden of proof. The municipality's findings must have provided it with a " 'strong basis in evidence for its conclusion that remedial action was necessary.' " *Croson*, 488 U.S. at 500, *quoting Wygant*, 476 U.S. at 277. The municipality need not "convinc[e] the court of its liability for prior unlawful discrimination"; nor must the court "make an actual finding of prior discrimination based on the [municipality's] proof before the [municipality's] affirmative action plan will be upheld." *Id.* at 292. The municipality must 'merely' cite findings "approaching a prima facie case of

a constitutional or statutory violation." *Croson*, 488 U.S. at 500. Concrete Works' citation to *Coral Construction* as authority that it should be allowed to refute Denver's statistics in district court is inapposite. In *Coral Construction*, the Court allowed Plaintiff to rebut post-enactment statistical evidence of discrimination submitted by the County only days before a hearing on summary judgment in the district court, but rebuttal in district court was necessary only because the Court ruled King County to have an insufficient factual predicate absent the new evidence. 941 F.2d at 921. In the case at bar, we believe that Denver's pre-enactment evidence constitutes a sufficient factual predicate and that Concrete Works has failed to bear its burden of attacking that evidence as it must – *on summary judgment and before trial* – in a meaningful way.

No municipality can avoid honest differences in the interpretation of its statistical evidence of discrimination. Although Concrete Works is able to say that disagreements exist (and would have the Court deny summary judgment on that basis), those disagreements can be resolved as a matter of law. We do not believe strict scrutiny allows a court to completely substitute its own judgment for a legislature's reasonable belief that it has a "strong basis in the evidence." In any event, we believe that the large, exhaustive body of evidence adduced by Denver would more than outweigh the force even of Concrete Works' potentially legitimate criticisms. Denver has presented the Court with numerous statistical and anecdotal findings of discrimination from the late 1970s to the present, including: the 1978 GAO report; the 1979 DPW report; the 1981 Peat, Marwick study; the 1983 City

Council hearing and findings; the 1988 DPW hearings and report; the 1988 City Council hearing and findings; certification applications submitted under the 1989 amendment; answers to the City's 1988 questionnaire regarding discrimination in the local construction industry; the 1990 Disparity Study; the 1991 Disparity Study; and the 1992 RTD study.

Denver's Ordinance suffers from none of the defects that doomed the plans in *Croson* and *O'Donnell*, 963 F.2d at 425-26 (finding statistics lacked specificity, used an overly small sample size, covered only one year's worth of contracts, did not show discrimination in the relevant construction industry, and did not discern among qualified and unqualified MBEs). The evidence of discrimination on which it is based quantitatively and qualitatively allows of a reasonable inference of discrimination in the awarding of contracts in Denver's construction industry. We therefore find that Denver had an adequate factual predicate for its finding that discrimination existed in the local construction industry. We further find that Denver's interpretation of its factual predicate survives strict scrutiny.

C. Narrow Tailoring

In order to survive strict scrutiny, any race-conscious remedy must also be narrowly tailored to redress the consequences of discrimination. *Croson*, 488 U.S. at 507-08. Courts have isolated three characteristics identified by *Croson* as indicative of narrow tailoring. *See, e.g., AGCC II*, 950 F.2d at 1416; *Coral Construction*, 941 F.2d at

922; *Cone Corp.*, 908 F.2d at 916-17. First, a W/MBE program should be instituted either after, or in conjunction with, race neutral means of increasing minority business participation in public contracting. *Croson*, 488 U.S. at 507. Second, the plan should avoid the use of rigid numerical quotas. *Id.* at 507-08. Third, "an MBE program must be limited in its scope to the boundaries of the enacting jurisdiction." *Id.* at 491-92.

1. Race- and Gender-Neutral Means

Concrete Works does not dispute that Denver enacted the Ordinance after or in conjunction with race-neutral means of increasing W/MBE participation in public contracting. Indeed, prior to enacting the Ordinance, Denver had already considered eliminating pre-qualification requirements and breaking down projects to facilitate small business participation, and had implemented bond guarantee programs, a prompt payment ordinance, a contractor mentor program, and a pre-apprenticeship program. Denver, Co., Rev. Mun. Code ch. 28, art. III, div. 3, § 28-52(a)(4). *Cf. Croson*, 488 U.S. at 507 (noting that "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting"). The City determined that some race-neutral measures were not available to it: payment and performance bonds were required by state law to be maintained on a majority of City construction contracts; under Denver's charter construction contracts must be awarded to the lowest responsive bidder; and all contractors must pay the prevailing wage. Further, in conjunction with the race-conscious portion of the Ordinance, the

City still provides for numerous neutral good faith requirements, improved instructional resources for inexperienced contractors, and city and contractor information outreach. *Id.* Strict scrutiny requires only good faith, not exhaustion of all alternatives. *AGCC II*, 950 F.2d at 1417; *Coral Construction*, 941 F.2d at 922.

2. Waiver and Flexibility

We next examine the Ordinance for flexibility and opportunities for waiver. It is clear the Ordinance does not contain anything approximating a "rigid numerical quota." *Cf. Croson*, 488 U.S. at 508 (noting that 30% set-aside was narrowly tailored to no goal but outright racial balancing). The goals provisions create goals systems that are best characterized not as the quotas or set-asides Concrete Works insists they are, but rather as *flexible aspirational goals*. The first level of analysis of the goals provisions should note that no one is required to meet any specific goal set by the City. All contractors have open to them the route of good faith compliance.

The second level of analysis asks the methodology used in setting the goals. The Ordinance indicates that the goals are set on a project-by-project basis. The *Croson* Court suggested that plans with waivers permitting case-by-case consideration presented fewer or no constitutional problems. *Croson*, 488 U.S. at 507-08. Under the Ordinance, three goals committees, all with membership apportioned among experienced nonminorities, minorities, and women, advise the OCC Director in setting goals. Individual project goals may range from the 0%

goal set on 24% of all 1991 projects to a figure that may be larger than the annual goal.

The third level of analysis includes how the goals are actually implemented. As we have noted, the goals are rarely met – in 1991, goals were met on only 63% of contracts and overall utilization for MBEs and WBEs was 76% and 50%, respectively, of the annual goal set. We see this as clear evidence that the flexible aspirational goals are in fact just that, and no quota can be said to exist. *Compare O'Donnell*, 963 F.2d at 423 (observing that percentage goal "became far more than merely a hope, a wish or an aspiration" because ordinance stated municipality "shall" allocate a certain percentage of construction contracts) *with Hillsborough*, 908 F.2d at 917 (approvingly noting goal of 25% was flexible because municipality's "working goal" was only 19% and was not applicable to every project) *and* Ordinance, § 28-55 ("the Director *may* establish . . . annual remedial goals of sixteen (16) . . . and twelve (12) per cent . . . ") (emphasis added).

In the fourth level of analysis, in order not to be deemed overly rigid, a goals plan should remedy only specified discrimination. Concrete Works complains that Denver has indiscriminately "lump[ed] ethnic groups together" for the purpose of determining whether their members have suffered from discrimination. Implicit in Concrete Works' criticism is an objection to the rebuttable presumption the Ordinance grants all W/MBE applicants. Concrete Works claims that of 372 approved W/MBE applications there are over 100 containing admissions that the applicants did not believe themselves to have

suffered discrimination.[17] Concrete Works appears to assume that it is possible for minority contractors always to be aware whether they have been excluded from consideration or treated differently. There is no basis for imputing such knowledge. Indeed, a statistical study of the pattern of contract awards in an entire industry is precisely the mechanism to disprove such illogic. It is also conceivable that at least some number of minorities

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[17] We note that at the same time Concrete Works excoriates the validity and reliability of anecdotal evidence, it accords virtually dispositive weight to the anecdotal representations of certain minority contractors who claimed not to have suffered discrimination. The anecdotal representations of the minority contractors may or may not be accurate; it is to provide foundation for such testimony that we look to statistical evidence, and whatever minority contractors may believe or claim to believe, the statistical evidence shows racial disparities among firms in contract awards, revenues, and number of employees.

We further note that a requirement of proving the need for individual remedies would resolve only the symptom and not the problem of pervasive, often unconscious discrimination. Those who had not suffered discrimination or claim not to have suffered discrimination would have no guarantee barring future discrimination against them. Such a requirement would also logically require inquiry into whether particular nonminority firms had ever personally benefitted from discrimination. *Croson* does not mandate such onerous and even irrelevant considerations. Once a municipality finds a strong statistical and anecdotal basis for its belief that discrimination exists, it must be allowed to presume that discrimination may not only be intentional but may be aversive, or unconscious and unintentional; that most minorities in the area have suffered such discrimination, especially where their firms are disproportionately small or lacking in revenues; and that only a system-wide, generally applicable response will alleviate the problem and allow minorities to "catch up" to level of performance created by white advantage.

claimed not to have suffered discrimination because they feared retaliation, stigmatization, the presumption that they received benefits due only to their race, or any of the other negative effects of affirmative action.

In *AGCC II*, the District Court reasoned that:

> an iron clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race conscious remedy superfluous. For such a remedy could only be applied solely on the basis of the beneficiary's status as a 'past victim' and without reference to any racial classification at all.

748 F. Supp. 1443, 1455 (N.D. Cal. 1990). The *Croson* Court did not eliminate racial classifications altogether. 488 U.S. at 509 (plurality) (noting that "in the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion"); *id.* at 511 (Stevens, J., concurring) (observing that government decisions resting on racial classifications are in some cases permissible); *id.* at 519 (Kennedy, J., concurring) (refusing to adopt automatic rule against racial preferences). The City is not required to make a "finding of specific instances of discriminatory exclusion for each MBE . . . [I]f systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination." *Coral Construction*, 941 F.2d at 925; *see also Wygant*, 476 U.S. at 287 (noting that an affirmative action plan "need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored.' "); *AGCC II*, 950 F.2d at 1417 n.12. We note further that the presumption of discrimination is rebuttable; the W/MBE

certification is subject to a revenue cap above which a minority- or woman-owned business 'graduates' from the aspirational goals measures, losing not only the presumption but any ability to be certified a W/MBE; and the Ordinance, limited to five years' duration, is scheduled to expire on August 31, 1995.

Concrete Works' second objection is that no pattern of discrimination was shown for every racial group. This is not the case. The disparity studies, among other evidence, clearly show disparities for all four racial minorities referred to in the Ordinance. *Compare Croson*, 488 U.S. at 506 (noting that the gross over inclusiveness of Richmond's racial preference – which includes Aleut and Eskimo citizens – "strongly impugns the city's claim of remedial motivation") *and O'Donnell*, 963 F.2d at 427 (noting that municipality made no findings of discrimination against Hispanics, Asian Americans, Pacific Islanders or Native Americans) *with Hillsborough*, 908 F.2d at 917 (observing as evidence of narrow tailoring fact that ordinance grants only 1% goal to groups not widely discriminated against in Hillsborough County, Florida, such as Eskimos, Asian Americans, and Native Americans) *and AGCC II*, 748 F. Supp. at 1454 (approving limitation of ordinance to groups evidence shows were discriminated against). While the statistics of disparity for American Indians and Asian-Americans admittedly carry less statistical significance, the reason for that lesser significance is the small sample size of contractors from those groups. Were we to forbid the City to infer discrimination against these groups simply because the number of their contractors is so small, we would be engaging in a circular argument: discrimination against these groups may not

be remedied because discrimination, among other things, has kept their numbers so small that discrimination cannot be proven with airtight statistical significance. The statistics which do exist on these groups show disparity, and for the foregoing reasons we do not believe the Court may deny the City's inference that these groups also suffer from discrimination.

Examples of waiver and alternative routes of compliance in the Ordinance read like a how-to manual on narrowly tailored aspirational goals ordinances. Prime contractors need only award a bid to a W/MBE if the W/MBE is the lowest qualified bidder, Ordinance, § 28-58(9), where "qualified" means that the W/MBE has "the financial ability, skill, experience and access to the necessary staff, facilities and equipment" to perform the work. *Id.*, § 28-54. So that minorities and women do not incorporate contracting companies simply to take advantage of the Ordinance, a W/MBE must have engaged in sustained business activity in the construction business for at least three months. *Id.*, § 28-73(3). The prime contractor is allowed to show why a W/MBE should not be awarded a contract despite being the lowest bidder, and may consider nonmonetary factors such as the prime's past experience with a certain subcontractor. *Id.*, §§ 28-54, 28-58. Goals are set only where there are qualified MBEs available. Good faith efforts to secure minority participation provide a waiver to meeting the goals. A contractor certified as both a WBE and an MBE may count its own work toward fulfillment of the goals only once, and not in fulfillment of both the WBE and MBE goals. *Id.*, § 28-57(1). Non-minority prime contractors may count the

work of W/MBE contractors in satisfaction of the requirements through both subcontracting and joint ventures. *See AGCC II*, 950 F.2d at 1418 (approving possibility of joint ventures as evidence of narrow tailoring). The Ordinance allows prime contractors to resubmit information or to clarify their original good faith efforts, *id.*, § 28-59, and to make administrative appeals of the City's decisions, *id.*, § 28-33. *See AGCC II*, 748 F. Supp. at 1454 (approving possibility of administrative appeals as evidence of narrow tailoring). The Ordinance provides for annual review of its efficacy, capacity and utilization calculations, and the level of its goals. Ordinance, § 28-55. It is limited only to smaller W/MBEs under the presumption that firms attaining over a certain level of annual gross receipts have overcome the effects of discrimination and should be graduated from the program. *See AGCC II*, 950 F.2d at 1417 (approving of graduation requirement because it avoids windfalls to MBEs that have overcome discrimination); *Hillsborough*, 908 F.2d at 917 (same). It is not applicable to any contracts for which any part of the contract price is paid by the federal government. Ordinance, § 28-79. It is not of unlimited duration, but rather is scheduled to expire on August 31, 1995. *See AGCC II*, 748 F. Supp. at 1454 (approving limited duration of ordinance as evidence of narrow tailoring). Denver's aspirational goals ordinance is even more modest than the "modest" bid preferences approved by other courts. *See, e.g., AGCC II*, 748 F. Supp. at 1453.

3. Remedies Addressing the Enacting Jurisdiction

The final criterion established by *Croson* and its progeny is that a race-conscious remedy be limited to eradicating discrimination within the boundaries of the enacting jurisdiction. There can be no doubt that although Denver gathered evidence of discrimination by contractors based in cities adjoining Denver County, the Ordinance itself applies only to contracts awarded by the City and County of Denver for work within the City and County of Denver by contractors within the Denver MSA.

Similarly, although minorities from outside the state of Colorado appear to be eligible for W/MBE status, they too must either attest to City-sponsored discrimination or show that they have attempted to work in the Denver MSA in the period prior to the Ordinance, that is, the period during which Denver inferred the existence of discrimination. We note *Croson*'s criticism of the "gross overinclusiveness" of Richmond's provision of remedial relief to an Aleut citizen who "moves to Richmond tomorrow." 488 U.S. at 506. However, unlike Richmond's, Denver's ordinance confers no remedial benefits on members of groups which have not suffered past discrimination in the Denver market. Racial groups not represented in Denver may not avail themselves of the Ordinance and neither may individuals even of the protected groups who nevertheless have never attempted to do business in Denver. Moreover, if Denver tried to limit the remedy for its own discrimination to contractors based on residence, it would face even more serious constitutional challenges

from contractors who allege discrimination by Denver but have been excluded from the remedy.

4. Conclusion

We are satisfied that the Ordinance is narrowly tailored; indeed, if it were not, then we have grave doubts about whether *any* ordinance could pass scrutiny under so exceptionally strict a test. Although the Ordinance is assuredly not perfect, we doubt that any ordinance could achieve perfection in both process and result. The ordinance is a constitutional permissible exercise of the legislative power by Denver. It is not constitutionally infirm in any respect. There are no genuine issues of material fact and the Defendant is entitled to judgment as a matter of law.

V.

Accordingly, it is ordered that:

(1) Defendant's Motion for Summary Judgment, filed September 29, 1992, is GRANTED. The Clerk of the Court is DIRECTED to enter judgment in favor of Defendant, The City and County of Denver, Colorado, a municipal corporation and against Plaintiff, Concrete Works of Colorado, Inc., a Colorado corporation.

(2) Plaintiff's Objection to Evidence Submitted with the Reply Brief of Denver in Support of Its Motion for Summary Judgment, filed November 6, 1992, is OVERRULED.

(3) All parties to bear their own costs.

Dated this 26th day of February 1993, at Denver, Colorado.

BY THE COURT:

/s/ Sherman G. Finesilver,
Sherman G. Finesilver,
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92-F-21

CONCRETE WORKS OF COLORADO,
a Colorado corporation,

Plaintiff,

v.

THE CITY AND COUNTY OF
DENVER, COLORADO,
a municipal corporation,

Defendant.

JUDGMENT

(FILED FEB. 26, 1993)

PURSUANT TO and in accordance with the Order Regarding Motion for Summary Judgment filed February

26, 1993, by the Honorable Sherman G. Finesilver, Chief Judge, it is

ORDERED that judgment is entered in favor of the defendant, The City and County of Denver, Colorado, and against the plaintiff, Concrete Works of Colorado, Inc., and the complaint and cause of action are dismissed with prejudice. It is

FURTHER ORDERED that each party shall bear its own costs.

DATED at Denver, Colorado, this 26th day of February, 1993.

FOR THE COURT:

/s/ James R. Manspeaker
JAMES R. MANSPEAKER, CLERK

UNITED STATES DISTRICT COURT

OFFICE OF THE CLERK

DISTRICT OF COLORADO

Feb. 26, 1993

JAMES R. MANSPEAKER,
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RE: 92-F-21, CONCRETE WORKS OF COLORADO, INC. v. CITY & COUNTY OF DENVER

Enclosed please find a copy of ORDER REGARDING MOTION FOR SUMMARY JUDGMENT and JUDGMENT DATED Feb. 26, 1993, entered by Chief Judge Sherman G. Finesilver in the referenced matter.

JAMES R. MANSPEAKER, Clerk

By: /s/ N. Hatcher
Deputy Clerk

APPENDIX C

Ordinance No. 513, Series of 1990, Denver, Colo., Rev. Mun. Code ch. 28, art. III (1982)

ARTICLE III. NONDISCRIMINATION IN CITY CONTRACTS

DIVISION 1. OFFICE OF CONTRACT COMPLIANCE

Sec. 28-31. Office created.

(a) There is hereby created the office of contract compliance as a staff agency under the mayor. The office shall consist of the director and appropriate staff.

(b) The office of affirmative action, together with all current employees, is hereby transferred to and shall constitute the office of contract compliance. The position of affirmative action officer is hereby retitled director of the office of contract compliance. The office of contract compliance is authorized to employ such other employees and assistants as may be necessary to enable it to fulfill its duties.

(c) The director of the office of contract compliance shall be responsible to the mayor for the performance of the functions, power and duties assigned to the office of contract compliance by this article subject to and consistent with the provisions of the Charter and ordinances of the city. (Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-32. Powers and duties.

(a) The office of contract compliance shall perform all tasks and responsibilities established by this article together with such other tasks and responsibilities as may

be assigned to such office by ordinance or otherwise or which may devolve upon such office by operation of federal law.

(b) The director is hereby delegated the authority to promulgate such rules and regulations and/or informal guidelines as may be necessary to effectuate the purposes of this article.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-33. Administrative review and court proceedings.

(a) Any person who disputes any determination made by or on behalf of the city pursuant to and by authority of the director, which determination adversely affects such person, may petition the director for a hearing concerning such determination no later than thirty (30) days after having been notified of any such determination.

(b) The director may hold such hearing himself or in his sole discretion may designate and request a hearing officer employed by the city to act as a hearing officer with authority to hold such hearing or such hearings.

(c) Such petition shall be in writing, and the facts and figures submitted shall be submitted under oath or affirmation either in writing or orally at a hearing scheduled by the director or the hearing officer. The hearing, if any, shall take place in the city, and notice thereof and the proceedings shall otherwise be in accordance with rules and regulations issued by the director or the manager of

public works. The petitioner shall bear the risk of nonpersuasion, and the standard of proof shall conform with that in civil, nonjury cases in state district court.

(d) Thereupon, the director or his designee shall make a final determination. Such final determination shall be considered a final order of the director and may be reviewed under Rule 106(a)(4) of the state rules of civil procedure.

(e) The district court of the second judicial district of the state shall have original jurisdiction in proceedings to review all questions of law and fact determined by the director by order or writ under Rule 106(a)(4) of the state rules of civil procedure. (Ord. No. 513-90, § 2, 9-4-90)

Secs. 28-34 – 28-40. Reserved.

DIVISION 2. EQUAL EMPLOYMENT OPPORTUNITY

Sec. 28-41. Legislative intent.

It is the policy of the city to provide equal opportunity in employment without regard to race, color, creed, sex, national origin, religion, marital status or political opinion or affiliation. It is hereby deemed and declared to be for the public welfare and in the best interests of the city to require bidders, contractors and subcontractors soliciting and receiving, directly or indirectly, compensation from or through the city for the performance of contracts as defined in this division to meet certain affirmative action and equal employment opportunity requirements for the hiring and promotion of members of

ethnic groups subjected to differential treatment, including members of Black, Hispanic, Asian-American and American Indian groups, in order to further equal opportunity in employment objectives.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-42. Definitions.

As used in this division, the following words and phrases shall have the following meanings unless otherwise clearly indicated by the context:

Covered contract: Any contract for which bidding is required in order for the city to make an award and not exempted by rules and regulations adopted by the manager.

Director: The director of the office of contract compliance.

Manager: The manager of public works.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-43. Contractual provisions on affirmative action required.

(a) Unless exempted from the provisions of this section by rules and regulations adopted by the manager, every covered contract regardless of how financed shall be subject to the affirmative action and equal employment opportunity requirements of this division and such rules and regulations and bidding conditions authorized thereunder that the manager shall adopt.

(b) The bidding specifications for every covered contract shall require the bidder to commit the bidder's organization to the affirmative action and equal employment opportunity requirements set forth therein. Affirmative action and equal employment opportunity requirements similar to those in the bidding specifications shall be included in all subcontracts awarded under every covered contract regardless of tier unless exempted by the rules and regulations of the manager, and the bidding specifications shall so require. Failure to subscribe to and accept such affirmative action and equal employment opportunity requirements shall render a bidder ineligible for contract award and a subcontractor ineligible to participate in the work for which an award is made.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-44. Compliance review.

The director shall have power to review the employment practices of contractors during the performance of every covered contract and of subcontractors during the performance of every subcontract awarded thereunder in order to obtain information relating to compliance or noncompliance with the affirmative action and equal employment opportunity requirements as follows:

(1) When a compliance review by the director indicates grounds for finding that a contractor awarded any covered contract or a subcontractor awarded any subcontract thereunder is not in compliance with the affirmative action and equal employment

requirements of this section or of the bidding specifications or contractual provisions relating to such requirements and the manager is so informed by the director, the manager shall give the contractor written notice to correct or to cause to be corrected the deficiencies within such reasonable period of time as the manager shall allow.

(2) If a contractor who has received a written notice from the manager to correct such deficiencies fails to meet affirmative action and equal employment opportunity requirements within the period of time allowed by the manager, the director shall so advise the manager in writing so that a hearing before the manager may be held in order for the manager to determine whether such contractor or subcontractor has failed to comply with the affirmative action and equal employment opportunity requirements.

(3) After giving notice and holding a hearing and upon determining that a contractor awarded any covered contract or a subcontractor awarded any subcontract thereunder has failed to comply with the affirmative action and equal employment opportunity requirements, the manager may impose such sanctions as the manager deems appropriate, including but not limited to suspending or terminating the contract involved or any portion thereof, which suspension or termination shall be considered a default under section A2.3-1(4) of the Charter, and causing to be

removed from the list of eligible prequalified contractors the names of contractors and subcontractors found by the manager to be in noncompliance with the affirmative action and equal employment opportunity requirements of any such contract or subcontract awarded thereunder until such time as the manager is satisfied that such contractors or subcontractors are in compliance with the affirmative action and equal employment opportunity requirements. In making such determination, the manager of public works shall be guided by those procedures and powers of C.R.S. 24-4-101 et seq. as amended from time to time, relating only to adjudication, provided that he may by rules and regulations adopt different procedures and powers. The provisions in such article relating to rulemaking shall not apply.

(4) Completion of work by the contractor or subcontractor found to be in noncompliance under any covered contract or subcontract awarded thereunder may be required by the manager and shall preclude neither completion of the administrative procedures nor imposition of sanctions authorized in this section.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-45. Rules and regulations.

The manager and the director shall each have power and authority and are hereby empowered and authorized to adopt consistent rules and regulations in relation to

affirmative action and equal employment opportunity requirements for every covered contract and subcontracts awarded thereunder. Such rules and regulations shall pertain to:

(1) Bidding specifications related to affirmative action and equal employment opportunity requirements which shall be incorporated in every covered contract and subcontract awarded thereunder regardless of tier;

(2) The adequacy or acceptability of responses of bidders to the affirmative action and equal employment opportunity requirements of the bidding specifications;

(3) The evaluation of the willingness and capability of bidders, contractors and subcontractors to meet affirmative action and equal employment opportunity requirements;

(4) The establishment of affirmative action and equal employment opportunity steps to be required of bidders, contractors and subcontractors;

(5) Standards for approval of affirmative action and equal employment opportunity programs to which bidders, contractors or subcontractors subscribe;

(6) Standards of performance under bidding specifications relating to affirmative action and equal employment opportunity;

(7) The procedures for reviewing contractors or subcontractors for compliance with affirmative action and equal employment opportunity requirements, including notice and hearing procedures;

(8) Standards for exemptions from the affirmative action and equal employment opportunity requirements of this section and rules and regulations adopted thereunder; and

(9) The form and content of reports and other information to be furnished to the affirmative action officer by such bidders, contractors or subcontractors.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-46. Federal requirements govern.

Whenever the requirements of this section or of the bidding specification or rules and regulations adopted by the manager relating to such requirements conflict in any way or to any degree with equal employment opportunity or affirmative action requirements of the United States of America and any such contract under consideration is funded in whole or in part by the United States of America or is otherwise subject to requirements having the force of law of the United States of America, then such requirements of the United States of America shall govern and control.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-47. Quarterly reports.

In the quarterly reports prepared by the director pursuant to section 28-77, the director shall provide information on the work force of all contractors and subcontractors for the covered contracts listed in such reports and shall list any contract exempted by rules and

regulations adopted by the manager. The work force information shall be provided for each ethnic group and by gender and shall include only those contractors and subcontractors that actually work on each contract.

(Ord. No. 513-90, § 2, 9-4-90)

Secs. 28-48 – 28-50 Reserved.

DIVISION 3. MINORITY AND WOMEN BUSINESS ENTERPRISE PARTICIPATION IN CITY CONTRACTS

Sec. 28-51. Study by Independent consultants.

(a) The city hired a team of consultants to conduct a comprehensive study of the utilization and capacity of minority and women-owned business enterprises and of the evidence of racial- and gender-based discrimination against such business enterprises in the construction, reconstruction and remodeling and professional design and construction services industries in the Denver metropolitan area. The study included:

(1) An analysis of data compiled from federal, state and city sources and by the consultants in a survey of over two thousand five hundred (2,500) firms;

(2) Over one hundred (100) interviews with knowledgeable persons and representatives of majority-, minority- and women-owned business enterprises in the construction, reconstruction and remodeling and professional design and construction services industries;

(3) an analysis of two and one-half (2½) days of testimony taken by the department of public works and one (1) night of testimony taken by city council presented by knowledgeable persons and representatives of majority-, minority- and women-owned business enterprises in the construction, reconstruction and remodeling and professional design and construction services industries and of numerous written allegations of racial- and gender-based discrimination contained in certification applications and affirmative action compliance enforcement records; and

(4) An analysis of the findings of city council, the manager of public works, the United States General Accounting Office and of independent consultants of the existence of racial- and gender-based discrimination in the construction, reconstruction and remodeling and professional design and construction services industries.

(b) The consultants concluded in a 275-page written report containing summaries of all of the above evidence that there was evidence of:

(1) Pervasive discrimination against Blacks, Hispanics, Asian Americans and Native American Indians and against women in the construction, reconstruction and remodeling and professional design and construction services industries in the six-county market area which includes the city; and

(2) Such discrimination by the City and County of Denver; by construction, reconstruction and remodeling and professional

design and construction services firms involved in city department of public works projects; by construction, reconstruction and remodeling and professional design and construction services firms which received bond financing from the city; by construction, reconstruction and remodeling and professional design and construction services firms (that perform work for the city) when performing work for private-sector clients; and by construction, reconstruction and remodeling and profesional design and construction services firms not having a connection with the city performing private-sector work in the relevant market area.

(c) The consultants further concluded, based on an analysis of race and gender neutral remedial measures, that while such neutral measures could improve opportunities for women and minority business enterprises, the enactment of such measures alone would not be effective in redressing the effects of discrimination. The consultants evaluated race- and gender-based assistance programs and recommended the enactment of a goals program for minority- and women-owned business enterprises for all construction, reconstruction and remodeling and professional design and construction services work performed for the city.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-52. Findings by city council.

(a) *Generally.* The city, having held extensive public hearings prior to the enactment of Ordinance No. 246,

Series of 1983; Ordinance No. 424, Series of 1988; and Ordinance No. 213, Series of 1989; having hire [sic] independent consultants who found evidence of discrimination; and having analyzed the evidence, data, findings, conclusions and recommendations of the consultants, hereby finds that:

(1) There exists a prima facie showing that women business enterprises and minority business enterprises owned by Blacks, Hispanics, Asian Americans and American Indians who have done business or attempted to do business in the private and public construction, reconstruction and remodeling and professional design and construction services industries within the city have suffered from discrimination. This discrimination has existed in the city's public works contracting practices, in the private industries' contracting of public works contracts in which the city has been a passive participant and in the contracting practices in the private construction, reconstruction and remodeling and professional design and construction services industries in the Denver metropolitan area. Because of such discrimination, such women business enterprises and minority business enterprises have not received the share of professional design and construction services contracts and subcontracts and of construction, reconstruction and remodeling contracts and subcontracts which they would have received absent such discrimination.

(2) Such discrimination in contracting opportunities violates the city's constitutional duty to eliminate race- and gender-based

discrimination in the conducting of its business and must be corrected in the future.

(3) Such discrimination has prevented such women business enterprises and minority business enterprises from participating both in the city's public works contracting opportunities in the construction, reconstruction and remodeling and professional design and construction services areas and in the private or nonpublic construction, reconstruction and remodeling and professional design and construction services areas at a level which would have existed absent such discrimination.

(4) Such discrimination requires the city to continue alternative race and gender neutral remedies to assist minority and women business enterprises, including assistance in achieving insurance and bonding capability, improvement of payment procedures, improved instructional resources for inexperienced contractors and city and contractor information outreach insofar as the city may effectively and lawfully do so. However, such race and gender neutral remedies alone will not be effective to redress the effects of the discrimination.

(5) Without an active race- and gender-based remedial goal program, such women business enterprises and minority business enterprises would remain unable to participate in city contracts for construction, reconstruction and remodeling and for professional design and construction services at a level reasonably commensurate with their availability and capacity.

(b) *Remedial program of goals.* The city, therefore, finds and declares that it has a compelling governmental interest in remedying such past discrimination by the adoption of a limited remedial program of goals as set forth in this division in order to enhance the participation of women business enterprises and minority business enterprises, who have done or have attempted to do business in the city and thus have suffered from past discrimination, in contracts and subcontracts for work on construction, reconstruction and remodeling and on professional design and construction services as authorized to be let pursuant to the Charter and ordinances of the city. This remedial program has been carefully structured to take into consideration factors such as present availability and capacity of such women business enterprises and minority business enterprises to perform work on such city contracts and to take into consideration the effects of past discrimination. In order to ensure that participation in the program is directly related to the present availability and capacity of such minority business enterprises and women business enterprises, the remedial program includes three (3) components which narrowly tailor participation in the program to remedy past discrimination:

(1) Specific goals for participation for women business enterprises and minority business enterprises will be established for each project for professional design and construction services and for construction, reconstruction and remodeling work based on the availability and capacity of women business enterprises and minority business enterprises for that particular project;

(2) The program does not exclude non-minority-or nonwomen-owned business enterprises from contractual opportunities for professional design and construction services or construction, reconstruction and remodeling work for failure to meet project goals if such enterprises can demonstrate a good faith attempt to comply with goals established therein; and

(3) The program provides for graduation from the program of minority business enterprises and women business enterprises whose revenues indicate that they have had the opportunity to overcome the effects of discrimination.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-53. Purpose.

The purpose of this division consistent with the legislative findings stated above is to enable the city, through the manager of public works and the office of contract compliance, to undertake limited remedial activities to assist business enterprises who have been certified as MBEs and/or WBEs, which certification shall include a finding that such business enterprises have suffered from past race- or gender-based discrimination, to participate in the city's contracts for construction and for professional design and construction services (as defined in this division) to an extent approximating the level of availability and capacity of minority- and women-owned business enterprises which are doing business in the city in the private and public works construction, reconstruction and remodeling and professional design and construction

services markets adjusted for the effects of discrimination. These remedial programs shall have due regard for good-faith efforts by bidders and proposers to achieve utilization of such minority- and women-owned business enterprises to perform such contracts. The manager of public works and the office of contract compliance are hereby expressly delegated the necessary powers to effectuate the purpose of this division.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-54. Definitions.

As used in this division, the following words and phrases shall have the following meanings unless otherwise clearly required by the context:

Affiliate: Any business enterprise which is affiliated with the MBE or WBE or with the minority or woman upon which the certification is based. Business enterprises are affiliates of each other when:

(1) One either directly or indirectly controls or has the power to control the other;

(2) A third business enterprise or business enterprises control or have the power to control both; or

(3) An *identity of interest* between or among parties exists (including family relationships) such that affiliation may be found. In determining whether affiliation exists, consideration shall be given to all appropriate factors, including but not limited to common ownership, common management,

contractual relationships and shared facilities.

Guidance in the interpretation of this definition may be obtained by reference to the definition of affiliate set forth in 13 Code of Federal Regulations Chapter 1 as from time to time amended.

Bidder: A business enterprise that submits a bid on a city contract that is offered for competitive bidding.

Broker or *conduit* may be defined by the director.

Business enterprise: A corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, professional association or any other legal entity operated for profit that is properly licensed and/or otherwise authorized to do business in the State of Colorado.

Certification: Completion by a business enterprise of an application procedure to be developed by the office of contract compliance and formal authorization by the director to participate as an MBE and/or WBE under this division.

Commercially useful function is performed by a business enterprise when it is responsible for execution of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing and supervising the work involved. To determine whether an MBE/WBE is performing a commercially useful function, the amount of work subcontracted, industry practices and other relevant factors shall be evaluated.

Construction: Those areas of construction, reconstruction and remodeling as encompassed within the city's

contracting processes authorized by the Charter and ordinances of the city and as encompassed within the city's findings of discrimination set out herein.

Consultant: A business enterprise that enters into a negotiated contract in a privity of contract with the city for professional design and/or construction services as defined in this section.

Contract: Any city contract or purchase order for construction as defined herein or for professional design and construction services as defined herein authorized by any provision of the Charter or ordinances of the city, including but not limited to contracts and purchase orders awarded by competitive bidding or negotiated contracts. *Contract* shall include contracts and purchase orders ancillary to cooperative agreements or understandings with other public and private agencies for purposes, including but not limited to the development of public facilities, park and recreational facilities, programs and activities and the establishment and maintenance of museums, zoological and other gardens, collections of natural history and observatories, if such contracts and purchase orders provide for funding in whole or in part by the city and provide for utilization of such funds for the purpose of construction and/or professional design and construction services as defined herein for any public facility or area owned by the city or situated on real property owned by the city.

Contractor: A business enterprise that enters into a competitively bid contract in privity of contract with the city for construction work as defined in this section.

Director: The director of the office of contract compliance or his designee.

Joint venture: An association of two (2) or more business enterprises to constitute a single business enterprise to perform a city professional design or construction services contract or city construction contract for which purpose they combine their property, capital, efforts, skills and knowledge and in which each joint venturer is responsible for a clearly defined portion of work, performs a commercially useful function and shares in the ownership, control, management responsibilities, risks and profits of the joint venture.

Letter of intent: A written communication from a project bidder or proposer to the city with respect to a contract evidencing an understanding between and MBE or WBE and the bidder or proposer on such contract that such MBE or WBE has or will enter into a contractual relationship with the bidder or proposer on such contract.

Manager: The manager of public works or his designee.

Office of contract compliance: The office established by section 28-31 of this Code.

Minority: A person of Black, Hispanic, Asian-American or American Indian descent. For purposes of this division, a person of American Indian descent will be defined as a person of a minimum of twenty-five (25) percent blood quantum or a person who is properly enrolled, registered or recognized by the specific American Indian Tribe or Nation in which membership is claimed and which Tribe or Nation is federally recognized.

Minority business enterprise or *MBE:* A business enterprise which is certified by the director as meeting both of the following requirements:

(1) It shall be at least fifty-one-percent-owned by one (1) or more eligible minorities by whom certification is being sought; or, in the case of a publicly owned corporation, at least fifty-one (51) percent of its stock shall be owned by one (1) or more eligible minorities; and

(2) It shall be managed by and its daily business operations shall be controlled by one (1) or more eligible minorities by whom certification is being sought.

Professional design and construction services: Those areas of services ancillary to construction as defined herein, as encompassed within the city's contracting processes authorized by the Charter and ordinances of the city and as encompassed within the city's findings of discrimination set out herein, including but not limited to engineering, architectural, testing and construction management services.

Proposer: A business enterprise that submits a proposal on a city contract that is negotiated and not competitively bid.

Qualified: That the business enterprise has the financial ability, skill, experience and access to the necessary staff, facilities and equipment to complete contracts or subcontracts which it may undertake on projects. The director may develop methods and criteria for assessment of allegations of qualifications or lack thereof of a business enterprise. Nothing contained herein shall in any

respect supersede or invalidate rules and regulations that the manager may promulgate with respect to prequalification of city contractors without regard to their minority and/or women status.

Regular dealer: A supplier that owns, operates or maintains a store, warehouse or other establishment in which the materials or supplies required for the performance of the contract are bought, kept in stock and regularly sold to the public in the usual course of business. To be a regular dealer, the supplier must engage in as its principal business and in its own name the purchase and sale of the products in question. A regular dealer in such bulk items as steel, cement, gravel, stone and petroleum products need not keep such products in stock if it owns or operates distribution equipment. Brokers and packagers shall not be regarded as dealers within the meaning of this term.

Subcontractor or subconsultant: A business enterprise which is or will directly contract with a contractor or consultant or a business enterprise which is or will directly contract with other subcontractors or subconsultants under such contractor or consultant and which business enterprise will provide services or perform work under agreements with the contractor or consultant or with other subcontractors or subconsultants under such contractor or consultant.

Supplier: A subcontractor or subconsultant that provides materials, supplies and/or equipment to contractors, consultants, subcontractors or subconsultants as defined in this section.

Women business enterprise or *WBE:* A business enterprise which is certified by the director as meeting both of the following requirements:

(1) It shall be at least fifty-one-percent-owned by one (1) or more women by whom certification is being sought; or, in the case of a publicly owned corporation, at least fifty-one (51) percent of its stock shall be owned by one (1) or more women; and

(2) It shall be managed by and its daily business operations shall be controlled by one (1) or more women by whom certification is being sought.

For the purposes of this division, the director shall classify business enterprises owned by minorities and women and meeting the requirements herein for certification as an MBE or WBE as MBEs if minorities own a greater share of the business enterprise than women; the director shall classify such business enterprises as WBEs if women own a greater share of the business enterprise than minorities. Such a business enterprise owned by minority women may be certified as both an MBE and a WBE but may not be utilized as both in a single contract.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-55. Annual goal.

(a) Of the total dollars spent annually for construction and for professional design and construction services contracts, the director may establish and is hereby expressly delegated all discretionary and other necessary power to establish annual remedial goals of sixteen (16)

percent of the dollars spent for construction, reconstruction and remodeling contracts to MBEs, twelve (12) percent of the dollars spent for such contracts to WBEs, ten (10) percent of the dollars spent for professional design and construction services to MBEs and ten (10) percent of the dollars spent for such services to WBEs. For the purpose of setting goals, construction management services contracts shall be computed in and counted toward the construction area although construction management shall be considered a professional service. The director shall count toward the goal: Portions of work undertaken by WBEs and MBEs as contractors or consultants; portions of work undertaken by WBE and MBE subcontractors, subconsultants or suppliers (which are regular dealers) to or through such contractors or consultants and portions of work undertaken by WBEs and MBEs under joint-venture arrangements.

(b) The director as a basis for the establishment of such annual goals shall annually during the term hereof determine the present availability of and capacity of all WBEs and MBEs doing business in the city by profession and trade groupings and past utilization by the city of MBEs and WBEs, make an adjustment for the effects of discrimination and recommend such annual goals to the city council for its review. For the purpose of setting goals, *availability* shall mean the number of MBEs and WBEs; *capacity* shall mean the type and volume of work which can be performed; and *adjustment for the effects of discrimination* shall be based on all reasonable factors, including business formation rates, business growth rates and employment of minorities and women in the construction trades and the design and construction services

professions and on that level of city contracting which would exist absent the effects of past discrimination. The director shall conduct such inquiries, studies and hearings, which hearings shall be open to the public, utilizing information and assistance from such persons, consultants, entities or organizations as he may designate by rules and regulations and/or utilization of his discretion as he deems necessary to make such annual recommendation.

(c) The city council shall review such respective annual goals as recommended by the director, may undertake such additional inquiries as it deems appropriate and shall approve, disapprove or modify the annual goals by ordinance in each succeeding year hereunder. Until the city council approves, disapproves or modifies the annual goals in a succeeding year, the minimum goals established in this section shall continue in effect.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-56. Individual project goals.

(a) The director shall add a requirement to the bid or proposal instructions for each professional design and construction services and construction contract that a percentage of the dollar value of all work on such contract shall be assigned as a goal to MBEs and WBEs. The goal percentage assigned by the director to each such contract may vary from contract to contract as long as the dollar amount of the overall annual goal is met. The office of contract compliance shall establish a methodology for the setting of project goals, including the methodology to be followed by the goals committees, through

rules and regulations adopted by January 1, 1991. Such methodology shall consider the following factors:

(1) The effect of annual goal achievement of the varying levels of availability and capacity of MBEs and WBEs among industry groupings which are associated with individual projects and the effect on annual goal achievement of project goal compliance by good-faith efforts to utilize (but not actual utilization of) MBEs and WBEs.

(2) The known availability and capacity of MBEs and WBEs in specific industry groupings which are associated with individual projects.

(b) The following factors shall count toward project goals as more specifically provided below: Portions of work undertaken by WBEs and MBEs as contractors or consultants; portions of work undertaken by WBE and MBE subcontractors, subconsultants or suppliers (which are regular dealers) to or through such contractors or consultants and portions of work undertaken by WBEs and MBEs under joint-venture arrangements.

(c) As an aid in the establishment of such individual project goals, the director shall appoint three (3) goals committees to advise and assist the director in his determination:

(1) The general construction goals committee shall advise and assist the director with respect to his setting of individual project goals for general construction projects and for construction management services.

(2) The heavy highway construction goals committee shall advise and assist the director with respect to his setting of individual project goals for heavy highway construction projects.

(3) The professional services goals committee shall advise and assist the director with respect to his setting of individual project goals for professional design and construction services projects except for construction management services.

(d) The goals committees shall meet on a regular basis to be established by the director and shall consider and recommend to the director suggested individual project goals for prospective city contracts pursuant to guidelines developed by the office of contract compliance. Membership on all goals committees shall be balanced among minority business enterprises, nonminority business enterprises and women business enterprises. Members of the general construction goals committee shall be or have been directly engaged in the general construction industry, members of the heavy highway construction goals committee shall be or have been directly engaged in the heavy highway construction industry, and members of the professional services goals committee shall be or have been directly engaged in the professional design and construction services industry. Meetings of the goals committees shall be open to the public, and all advisory statements or recommendations made by the goals committees to the director shall be publicly posted by the director prior to the director's decision as to individual project goals. In rendering advice as to goals for each project, the goals committees

shall consider data as to the availability and capacity of types of MBEs and WBEs doing business in the city with respect to the substantive trade, material or professional requirements of each individual contract under consideration. The director may utilize such advice and assistance from the goals committees to the extent that he deems it to be appropriate and consistent with the remedial purposes of this division. The director may acquire such other information as he deems helpful to his determination and shall in his sole discretion establish such individual project goals for each contract, contract bid or proposal instructions or as otherwise promulgated by regulations.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-57. Construction, reconstruction and remodeling – Compliance with goals.

When the director sets goals for a project, then the bid specifications shall require that all bidders seeking to become a contractor with the city on such project shall either demonstrate sufficient good faith efforts or shall meet the project goals through one (1) or a combination of the following requirements:

(1) The bidder shall be an MBE or WBE, and the value of the commercially useful function to be performed by the MBE or WBE shall count toward satisfaction of the MBE or WBE goal (as applicable but not both);

(2) The bidder shall be a joint venture which includes one (1) or more MBEs or WBEs, and the value of the commercially useful

function to be performed by the MBEs and WBEs in the joint venture shall count toward satisfaction of the applicable MBE or WBE goals subject to the review and approval by the city of the joint-venture agreement pertaining to the project, confirming the utilization in the joint venture of joint management and full integration of work forces by the joint-venture partners;

(3) The bidder shall use MBEs and WBEs as subcontractors or suppliers (provided that the supplier is a regular dealer of the material supplied), and the value of the commercially useful function to be performed by such MBEs and WBEs shall count toward satisfaction of the applicable MBE or WBE goals.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-58. Same – Good-faith efforts.

(a) If the bidder has not fully met the project goals as required in section 28-57, then the bidder shall demonstrate that it has made good-faith efforts to meet the goals. The bidder shall furnish to the director on or before the fifth working day after bid opening a detailed statement of its good-faith efforts to meet the project bid specification goals set by the director. This statement shall address each of the items in subsection (b) and any additional criteria that the director may establish by rule or regulation.

The different kinds of efforts as well as the quantity and intensity of the efforts will be considered in determining whether the bidder has made a good-faith effort.

(b) The statement of good-faith efforts shall include a specific response to each of the following as further defined by rule or regulation. A bidder may include any additional information the bidder believes may be relevant. Failure of a bidder to show good-faith efforts as to any one (1) of the following categories shall render its overall good-faith showing insufficient:

(1) If prebid meetings are scheduled by the city at which MBEs and WBEs may be informed of subcontracting opportunities under a given project solicitation, attendance at such prebid meetings is not mandatory; however, bidders are responsible for the information provided at these meetings. The good-faith efforts statement must reflect the bidder's knowledge of the information provided at these meetings.

(2) Verification of advertisements soliciting bids from MBEs and WBEs for three (3) consecutive days in general or construction-related publications approved by the director. All such advertisements must expressly advertise a given project and expressly state that WBE and/or MBE participation on that project is being sought; other incidental reference to the project or listing of the bidder as a planholder is not sufficient. All such advertisements shall begin at least fifteen (15) days prior to bid opening. If the city publishes notice for bids on a project less than fifteen (15) days prior to bid opening, verification of advertisements for at least four (4) consecutive days shall be provided.

(3) Verification of efforts to contact by timely written notice to all appropriate WBEs or MBEs within identified subcontracting categories listed in the most current certification list of the office of contract compliance. The notice shall expressly describe the potential subcontracting categories for the particular project. Written notice to MBE or WBE firms that could not provide subcontracting bids or supplies consistent with the project's scope of work and reasonably consistent with industry practice and the bidder's past practices on similar projects will not be considered as satisfying the purposes of this category. If bidders have purchased project plans seven (7) calendar days or less before bids are due, documented phone calls in lieu of written notice shall be permitted.

(4) Verification of efforts to subcontract consistent with industry practice, with the WBEs and MBEs whom the bidder has contacted or who have contacted the bidder, including the names, addresses and telephone numbers of all WBEs and MBEs contacted; a description of efforts made to subcontract; a description of the information provided to WBEs and MBEs regarding the plans and specifications for portions of the work to be performed by subcontractors and members of a joint venture; and, if attempts to subcontract actually occurred, the dates and places of such process and a description of the outcome.

(5) Verification that the bidder attempted to recruit WBEs and MBEs from at least the

same geographic area from which it attempted to recruit other subcontractors and other members of a joint venture.

(6) Verification that, consistent with industry practice, the bidder gave WBEs and MBEs necessary access to and adequate time to review all necessary project plans, drawings, specifications and other documents as well as adequate time to prepare subcontract bids and/or negotiate joint venture arrangements.

(7) Verification that, reasonably consistent with industry practice and the bidder's past practices on similar projects, the bidder selected portions of the work to be performed by MBEs and WBEs in order to achieve the project goals, including consideration of structuring the contract into economically feasible units to facilitate meaningful MBE and WBE participation as subcontractors or suppliers.

(8) For each WBE and MBE which contacted the bidder or which the bidder contacted or attempted to subcontract with, consistent with industry practice, a statement giving the reasons why the bidder and the WBE or MBE did not succeed in reaching a subcontracting or joint venture agreement.

(9) Verification that the bidder rejected WBEs and MBEs because they did not submit the lowest bid or they were not qualified. Such verification shall include a verified statement of the amounts of all bids received from potential subcontractors on the project and that the bidder rejected MBEs and

WBEs because they did not submit the lowest bid from among such bids or they were not qualified. In making such a determination of not being qualified, the bidder shall be guided by the definition of *qualified* in section 28-54, but evidence of lack of qualification must be based on factors other than the amount of the MBE's or WBE's bid. For each WBE and MBE found to be not qualified, the verification shall include a statement giving the bidder's reasons for its conclusion.

(10) Verification that the bidder made efforts to assist WBEs and MBEs in obtaining bonds if any are required.

(c) By January 1, 1991, the director shall adopt rules and regulations providing specific deadlines for providing timely written notice as required by subsection (b)(3) herein and defining *consistent with industry practice* and *reasonably consistent with industry practice* as used in subsection (b). (Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-59. Same – Nonresponsive bids.

(a) *Failure to meet requirements.* If a bid which has goals for WBE and MBE participation does not meet the project goals or show good faith as set out in section 28-57 or 28-58, then the director shall request the manager or other appropriate city official to regard the bid as not responsive as required by section A2.3-1(1) of the city Charter or other applicable sections of the Charter or ordinances governing the contract.

(b) *Failure to make effort.* If, after reviewing and investigating the good-faith documentation furnished pursuant to section 28-58, the director finds that the bidder did not make sufficient good-faith efforts to recruit qualified WBEs and MBEs and/or did not provide sufficient documentation, then he shall request the manager or other appropriate city official to regard the bid as not responsive as required by section A2.3-1(1) of the city Charter or other applicable sections of the Charter or ordinances governing the contract.

(c) *Informal meeting.* Should the director find the bid nonresponsive in accordance with paragraph (a) or (b) above, the nonresponsive bidder may request an informal meeting with the director which shall be scheduled by the director. All deficiencies in the good-faith effort shall be explained to the bidder at such meeting after which the bidder shall be allowed an additional twenty-four (24) hours in which to submit additional information or to clarify the original good-faith effort. The director will at no time, however, allow additional subcontractors to be added to the bid or the original MBE/WBE participation submitted at the time of the bid to be changed.

If after this informal meeting the director still finds the bid to be nonresponsive, he shall make the request as stated in paragraphs (a) and (b) above.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-60. Same – Identification of participating MBEs and WBEs.

At the time of bid opening, the bidder shall list all MBEs and WBEs which are being utilized toward the satisfaction of project goals either as subcontractors or members of a joint venture. The list shall specify:

(1) The name, address, telephone number and contact name for the MBE or WBE;

(2) The value of the commercially useful function to be performed by the MBE or WBE;

(3) The percentage of the value of the commercially useful function to be performed by the MBE or WBE as compared to the total contract amount; and

(4) The designation of each particular utilized business enterprise as either an MBE or WBE;

(5) A verified statement from the bidder that the dollar amount of work to be performed by such MBEs and WBEs on the contract was furnished to the bidder prior to bid opening;

(6) A statement from the bidder that it understands that a *letter of intent,* including but not limited to values provided by subcontractors and suppliers, must be submitted to the director for each MBE and WBE listed within five (5) working days after bids are opened.

Only that level of MBE/WBE utilization demonstrated in accordance with this section at the time of bid

opening may be counted in satisfaction of project goals except as otherwise set out in sections 28-66 and 28-67.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-61. Professional design and construction services – Compliance with goals.

When the director set goals for a project, then the proposal specifications shall require that all proposers seeking to become a consultant with the city shall either demonstrate sufficient good-faith efforts or shall meet the project goals through one (1) or a combination of the following requirements:

(1) The proposer shall be an MBE or WBE, and the value of the commercially useful function to be performed by the MBE/WBE shall count toward satisfaction of either the MBE or WBE goal (as applicable but not both);

(2) The proposer shall be a joint venture which includes one (1) or more MBEs or WBEs, and the value of the commercially useful function to be performed by the MBE/WBEs in the joint venture shall count toward satisfaction of the applicable MBE or WBE goals subject to the review and approval by the city of the joint venture agreement pertaining to the project confirming the utilization in the joint venture of joint management and full integration of work forces by the joint venture partners;

(3) The proposer shall use MBEs and WBEs as subconsultants or suppliers (specifically provided the supplier is a regular dealer of

the material supplied), and the value of the commercially useful function to be performed by the MBE/WBEs shall count toward satisfaction of the applicable MBE or WBE goals.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-62. Same – Good-faith efforts.

(a) If the proposer has not fully met the project goals through one (1) or a combination of the requirements listed in section 28-61, then the proposer shall demonstrate that it has made good-faith efforts to meet the goals. The proposer shall furnish to the director on the latest date set for proposal submission or revision to the city a detailed statement of its good-faith efforts to meet the project proposal goals set by the director. This statement shall address each of the items in subsection (b) and any additional criteria that the director may establish by rule or regulation.

The different kinds of efforts as well as the quantity and intensity of the efforts will be considered in determining whether the proposer has made a good-faith effort.

(b) The statement of good faith efforts shall include a specific response to each of the following as further defined by rule or regulation. A proposer may include any additional information the proposer believes may be relevant. Failure of a proposer to show good faith efforts as to any one (1) of the following categories shall render its overall good-faith showing insufficient:

(1) If preproposal meetings are scheduled by the city at which MBEs and WBEs may be informed of subconsulting opportunities under a given proposal solicitation, attendance at such preproposal meetings is not mandatory; however, proposers are responsible for the information provided at these meetings. The good-faith efforts statement must reflect the proposer's knowledge of the information provided at these meetings.

(2) Verification of efforts to subconsult, consistent with industry and professional practice, with the WBEs and MBEs whom the proposer has contacted or who have contacted the proposer, including the names, addresses and telephone numbers of all WBEs and MBEs contacted; a description of efforts made to subconsult; a description of the information provided to WBEs and MBEs regarding the scope of work to be performed by subconsultants and members of a joint venture; and, if attempts to subconsult actually occurred, the dates and places of such process and a description of the outcome.

(3) Verification that the proposer attempted to recruit WBEs and MBEs from at least the same geographic area from which it attempted to recruit other subconsultants and other members of a joint venture.

(4) Verification that, consistent with industry and professional practice, the proposer gave MBEs and WBEs necessary access to and adequate time to review projected scopes of work and other documents as

well as adequate time to prepare subconsultant proposals and/or negotiate joint-venture arrangements.

(5) Verification that, reasonably consistent with industry and professional practice and the proposer's past practices on similar projects, the proposer selected portions of the work to be performed by MBEs and WBEs in order to achieve the goals, including consideration of structuring the contract into economically feasible units to facilitate meaningful MBE and WBE participation.

(6) For each MBE and WBE which contacted the proposer or which the proposer contacted or attempted to subcontract with consistent with industry and professional practice, a statement giving the reasons why the proposer and the MBE or WBE did not succeed in reaching a subconsulting or joint-venture agreement. For each WBE and MBE found to be not qualified, this statement shall include giving the proposer's reasons for its conclusion.

(c) By January 1, 1991, the director shall adopt rules and regulations defining *consistent with industry and professional practice* as used in subsection (b) herein.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-63. Same – Identification of participating MBEs and WBEs.

At the latest time of proposal submission or revision, the proposer shall supply a list of all MBEs and WBEs which are being utilized toward the satisfaction of project

goals either as subconsultants or members of a joint venture. The list shall specify:

(1) The name, address, telephone number and contact name for the MBE or WBE;

(2) The value of the commercially useful function to be performed by the MBE/WBE;

(3) The percentage of the value of the commercially useful function to be performed by the MBE or WBE as compared to the total contract amount;

(4) The designation of each particular utilized business enterprise as either an MBE or WBE;

(5) A verified statement from the proposer that the dollar amount of work to be performed by such MBEs and WBEs was furnished to the proposer prior to the date on which the proposal was due; and

(6) Shall also include a letter of intent, including but not limited to values provided by subconsultants and suppliers, which must be submitted to the director for each MBE and WBE listed.

Only that level of MBE/WBE utilization demonstrated in accordance with this section at the time of the latest date for proposal submission or revision may be counted in satisfaction of project goals except as otherwise set out in sections 28-66 and 28-67.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-64. Same – Nonresponsive proposals.

(a) *Failure to meet requirements.* If a proposal which has goals for WBE and MBE participation does not meet the project goals or show good faith as set out in section 28-61 or 28-62, the director shall request that the manager or other appropriate city official regard the proposal as nonresponsive, and such determination shall result in no further consideration by the city of the proposal.

(b) *Failure to make effort.* If, after reviewing and investigating the good-faith documentation furnished pursuant to section 28-62, the director finds that the proposer did not make sufficient good-faith efforts to retain qualified WBEs and MBEs and/or did not provide sufficient documentation, the director shall request that the manager or other appropriate city official regard the proposal as nonresponsive, and such determination shall result in no further consideration by the city of the proposal.

(c) *Informal meeting.* Should the director find the proposal nonresponsive in accordance with paragraph (a) or (b) above, the nonresponsive proposer may request an informal meeting with the director which shall be scheduled by the director. All deficiencies in the good-faith effort shall be explained to the proposer at such meeting after which the proposer shall be allowed an additional twenty-four (24) hours in which to submit additional information or to clarify the original good-faith effort. The director will at no time, however, allow additional subconsultants to be added to the proposal or the original MBE/WBE participation submitted at the time of the latest proposal or revision to be changed.

If after this informal meeting the director still finds the proposal to be nonresponsive, he shall make the request as stated in paragraphs (a) and (b) above.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-65. Time periods for documentation submitted to the city.

The documentation of good-faith efforts of a bidder or proposer and its subconsultants or of letters of intent to perform shall be submitted to the director within five (5) calendar days after bid opening for a construction contract or on the latest date for submittal or revision of a proposal to the city for a professional design and construction services contract.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-66. Compliance with goals a requirement of contract.

(a) For any construction contract or professional design or construction services contract for which the director has set a project goal, it shall be an ongoing, affirmative obligation of the contractor or consultant on such contract to maintain at a minimum compliance with the originally achieved level of MBE and WBE participation upon which the contract was awarded for the duration of the contract.

(b) A contractor or consultant who has been awarded a contract based upon a given level of MBE and WBE participation shall not:

(1) Fail to in fact utilize an MBE and/or WBE which was originally listed at bid opening or proposal submission in order to satisfy project goals without substituting another MBE or WBE (as appropriate) performing the same commercially useful function and dollar amount or without showing good-faith attempts to replace such MBE or WBE; or

(2) Fail to perform as an MBE or WBE or fail to allow an MBE or WBE functioning as a subcontractor, subconsultant or supplier to perform the commercially useful function, the value of which was originally counted for that MBE or WBE in awarding the contract; or

(3) Modify or eliminate all or a portion of the scope of work attributable to an MBE or WBE upon which the contract was awarded; or

(4) Terminate an MBE or WBE originally utilized as a subcontractor, subconsultant or supplier under the contract in order to be awarded the contract without replacing such MBE or WBE with another MBE or WBE (as appropriate) performing the same commercially useful function and dollar amount or without showing good-faith attempts to replace such MBE or WBE.

(c) Any action by a contractor or consultant listed in subsection (b) above shall constitute a material breach of the contract which shall entitle the city to exercise all of its rights at law or equity for such material breach in addition to exercising any of the other sanctions set out in section 28-72. If, following receipt of the notice to proceed

to the contractor or consultant, either an MBE or WBE has its certification terminated for a reason other than expiration of certification or an MBE or WBE fails to perform a commercially useful function, the value of which was originally counted for that MBE/WBE in awarding the contract, and the contractor or consultant can demonstrate that such termination or failure did not result from any action or inaction, whether direct or indirect, of the contractor or consultant, such termination of certification or failure to perform a commercially useful function shall be deemed to not affect the maintenance of compliance with the project goals and shall not be deemed a breach of the contract.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-67. Project change orders and amendments.

Any increase in the scope of work of a contract for construction, whether by amendment, change order, force account or otherwise, or any increase in the scope of services of a contract for professional design or construction services, whether by amendment or any other addition of special, additional or other services to the contract which increases the dollar value of the contract by the lesser of fifty thousand dollars ($50,000.00) or ten (10) percent of the previously established contract dollar value shall be subject to a goal in such amounts for MBEs and WBEs which, when applied to the particular increase, will cause MBE/WBE utilization on the contract as a whole to satisfy the MBE and WBE utilization goals which were included in the bid or proposal requirements. The contractor or consultant may satisfy such goals as

modified by utilizing existing project MBEs/WBEs or by soliciting new MBEs and/or WBEs in accordance with section 28-57 or 28-61 as applicable, or the contractor or consultant must show good faith in accordance with section 28-58 or 28-62 as applicable. The contractor or consultant shall supply to the director the documentation described in sections 28-58 and 28-60 or 28-62 and 28-63, as applicable, with respect to the goals on the increase.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-68. Schedule of work to be performed by MBEs and WBEs.

On or before the fifth working day following commencement of work on a contract, the contractor or consultant shall submit to the director a duplicate of the project schedule which sets forth in detail the anticipated schedule for utilization of all MBEs and WBEs on the project. In the event of a contract performance delay of more than one-third (1/3) of the originally estimated length of time between project notice to proceed and completion, such contractor or consultant shall submit to the director not later than the original estimated date of completion a revised schedule for utilization of all MBEs and WBEs on the project.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-69. Payments to subcontractors, subconsultants and suppliers.

All contractors and consultants shall promptly render payment to all subcontractors, subconsultants and suppliers on a contract. Each contractor and consultant shall provide with each pay request to the city on each contract, beginning with the second pay request, partial claim releases from subcontractors, subconsultants and suppliers in form and content satisfactory to the city, or shall provide, at the city's sole option, alternative proof of payment to subcontractors, subconsultants and suppliers, in form and content approved by the manager and the director, evidencing that all subcontractors, subconsultants and suppliers have been duly paid out of the proceeds of the contractor's or consultant's payments from the city under the contract, unless a bona fide dispute, documented in writing, exists between the contractor or consultant and the unpaid subcontractor, subconsultant or supplier.

(Ord. No. 513-90, § 2, 9-4-90; Ord. No. 746-91, § 1, 10-21-91)

Sec. 28-70. MBEs and WBEs to perform a commercially useful function and not to function as brokers or conduits.

(a) All WBE and MBE contractors and consultants with the city, and all MBE and WBE subcontractors or subconsultants in a bidder's or proposer's bid or proposal must actually perform a commercially useful function and must not function as a broker or conduit as

defined by the director. Consistent with industry or professional practice and as permitted by rules and regulations adopted by the director, WBEs and MBEs may enter into subcontracts, including subcontracts with nonWBEs and nonMBEs. However, in no case shall a WBE or MBE act as a conduit or broker for the purpose of passing on business to nonWBE or nonMBE firms while not itself performing a commercially useful function.

(b) The office of contract compliance shall evaluate the utilization of MBEs and WBEs to determine whether such MBEs and WBEs are performing a commercially useful function. This evaluation shall examine the amount of work subcontracted, industry practices and other relevant factors. The amount of MBE and WBE participation credited toward a goal shall be based upon an analysis of the specific duties that shall be performed by the MBE and WBE and the extent to which such duties constitute a commercially useful function. The director may undertake such inquiries or studies, engage such employees and/or retain such consultants as may be necessary to assist him in rendering these determinations.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-71. Burden of proof; investigations of compliance.

Any business enterprise affected by the operation of this division shall have the burden of proving its compliance with the requirements and obligations of this division as applicable. The office of contract compliance is empowered to receive and investigate complaints and allegations by MBEs, WBEs, third parties and/or city

personnel and/or to initiate its own investigations regarding compliance with the requirements and obligations of this division. In the event the office of contract compliance determines in its sole discretion that an investigation is warranted, upon written notice of such investigation, the affected party shall be obligated to cooperate fully with the investigation and shall have a continuing burden of proving compliance with the requirements and obligations of this division.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-72. Contract sanctions; failure to perform a commercially useful function; acting as broker or conduit; or falsifying records.

Contractors or consultants performing or utilizing MBEs or WBEs for a noncommercially useful function or as brokers or conduits or submitting false or misleading good-faith efforts or other statements or documentation shall be subject to sanctions, including but not limited to:

(1) The work performed by an [sic] WBE or MBE not providing a commercially useful function or functioning as a broker or conduit shall not count toward meeting the project goals.

(2) The contractor's or consultant's bid or proposal may be found nonresponsive.

(3) The city may exercise any or all of its rights contained in the contract terms and conditions short of termination of the contract.

(4) The contract may be suspended or terminated with the city reserving all its rights at

law or equity with such suspension or termination being deemed a contractor or consultant default under section A2.3-1(4) of the city Charter as appropriate.

(5) The contractor or consultant may be disqualified and debarred from being a contractor, consultant, subcontractor or subconsultant on any other city contracts for either one (1) full year or five (5) times the length of the contract or subcontract upon which the sanction was imposed, whichever is greater. The manager in that event shall regard as not responsive any bid or proposal received during this time period which includes the contractor or consultant as a contractor, consultant, subcontractor, subconsultant or a member of a joint venture.

(6) If a contractor or consultant or other business enterprise knowingly received new or additional work on a contract as a result of actions set out in this section, then the penalties in this section may be applied to such entity.

(7) The office of contract compliance may suspend or revoke an offending MBE's or WBE's eligibility for certification based upon such MBE's or WBE's acting as a broker or conduit, failing to perform a commercially useful function on a project or falsifying records.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-73. Certification and eligibility of MBEs and WBEs.

(a) *Procedures and methods.* The director shall, by rule and regulation and/or informal guidelines relating solely to internal management and procedure, establish reasonable procedures and methods for the certification of MBEs and WBEs in order to effectuate the purposes of this division. No business enterprise shall be eligible to be certified as an MBE or WBE if ownership and/or control of such business enterprise is held by a current employee of the city.

(b) *Criteria.* Criteria for such procedures and methods shall include but not be limited to:

(1) *Ownership.* A minority individual or a woman shall be deemed to be an owner of all or a portion of a business enterprise if such person:

a. Owns in his or her own name the interest in the business enterprise; and

b. Acquired the interest in an arms-length transaction; and

c. Acquired the interest with his or her own financial resources or has put his or her own financial resources at risk in the operation of the business enterprise.

(2) *Management and control.* Minorities and women shall be deemed to manage and control daily business operations only if such management and control shall be real, substantial and continuing and shall go

beyond the *pro forma* ownership of the business enterprise as reflected in its ownership documents. The minorities or women shall possess the power to direct or cause the direction of the management and policies of the business enterprise and to make the day-to-day as well as major decisions on matters of management, policy and operations. The business enterprise shall not be subject to any formal or informal restrictions which limit the customary discretion of the minority or women owners. In addition to the foregoing, management and control of daily business operations must be specifically demonstrated by a showing of at least one (1) of the following factors:

a. The minorities or women hold the professional license or contractor license relied upon by the business enterprise;

b. The minorities or women have substantial experience in the trade or industry which would be necessary to be the primary decision makers for the business enterprise;

c. The minorities or women regularly make decisions, hold themselves out to the public and sign important documents and financial instruments in a manner which is indicative of primary management and control of daily business operations. With respect to the foregoing requirement, every professional design and construction services business enterprise must either demonstrate that the minorities or women hold the professional license relied

upon by the business enterprise or prove that the person who holds the professional license upon which the business enterprise relies does not derive the primary benefit of certification.

(3) *Actively in business for three months.* The business enterprise may not be certified until three (3) months after the satisfaction of all of the following:

a. Formation of the business enterprise;

b. Commencement of sustained business activity in the trade or profession described on the certification application; and

c. Commencement of ownership, management and control of daily business operations by the minorities or women.

(c) *Eligibility; evidence of discrimination.* The minorities or women upon whom the application for certification is based shall supply credible evidence by either written document or affidavit that such person has suffered from past racial- or gender-based (as applicable) discrimination in association with the conduct of business or the attempt to conduct business as a business enterprise in the construction or in the professional design and construction services industries in the City and County of Denver. Any MBE, WBE, woman or minority individual who demonstrates that he, she or it so conducted business or attempted to conduct business in the construction industry or in the professional design and construction services industry in the City and County of Denver prior to June 1, 1990, shall be rebuttably presumed based on

the findings summarized in section 28-52 hereof to have suffered from past discrimination.

(d) *Continued eligibility and renewal of certification.* No MBE or WBE shall be eligible for certification if such MBE, WBE or the MBE/WBE combined with any affiliate meets the criteria set forth in section 28-74 for graduation from the program. Following initial certification, an MBE or WBE which desires to renew its certification shall, thirty (30) days prior to each annual anniversary of the certification, submit a renewal application which shall update and reaffirm all requirements for certification. Such timely renewal application, if and when approved, shall be effective on the date of the annual anniversary of the certification. A certification shall terminate automatically and without notice upon the failure of the business enterprise to satisfy the requirements set forth in this section.

(e) *Interviews, investigation and onsite visits.* The office of contract compliance shall personally interview all persons upon whom eligibility for certification is based and is empowered to interview such other persons and conduct such onsite visits and investigations as may be appropriate in its sole discretion to verify eligibility for certification.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-74. Program graduation.

(a) *Graduation criteria.* Following certification of an MBE or WBE, no certification shall be renewed if on the effective date of the renewal the MBE or WBE (combined

with all affiliates) has achieved the following level of annual receipts averaged over a three-year period (which shall be determined as set forth in 13 Code of Federal Regulations, Chapter 1):

SIC	*Major Group Applicable to MBE/WBE*	*Annual Receipts*
15	Building construction – General contractors and operative builders.....	$10 million
16	Heavy construction other than building construction – Contractors	$10 million
17	Construction – Special trade contractors.....	$ 5 million
87	Engineering, accounting, research management and related services (including architects).....	$ 3 Million

If an MBE or WBE has an affiliate in a different SIC major group, the annual receipt level which shall be used as the graduation criterion shall be the highest annual receipt level applicable to the MBE/WBE and the affiliate. If an MBE or WBE or any affiliate performs work in more than one (1) of the above SIC major groups, the annual receipt level which shall be used as the graduation criterion shall be the highest annual receipt level applicable to the MBE/WBE and the affiliate. Graduation of an MBE or WBE shall not affect the contribution made by the MBE or WBE toward satisfaction of a project goal if the work was bid or proposed to be performed by the MBE/WBE prior to the date of ineligibility for certification based on achievement of a graduation criterion.

(b) *Application to affiliates.* The graduation criteria set forth above shall be deemed to apply to the minorities or women upon whom eligibility for certification is based and all affiliates of such minorities and women. No business enterprise shall be certified based upon one (1) or more minorities or women who owned or who was an affiliate of an MBE or WBE which has become ineligible for renewed certification because of the achievement of graduation criteria.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-75. State or federal law and other guidelines.

In making any findings required herein, the director may incorporate by reference rules, procedures and powers of C.R.S. 24-4-101 et seq. as it may exist on the date of enactment of this division or as it may hereinafter be amended. In making any findings required herein or in aid of definition or interpretation of any term or phrase herein, the director may utilize as a guide, insofar as they are consistent with the purpose of this division, the provisions of 49 Code of Federal Regulations and 13 Code of Federal Regulations as they exist on the date of enactment of this division or as they may hereafter be amended.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-76. Prebid meetings.

In order to permit bidders and/or proposers to inform MBEs and WBEs of subcontracting opportunities, the director shall conduct prebid and/or preproposal

meetings for all bids and/or proposals which require MBE and/or WBE participation.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-77. Quarterly reports.

The director shall prepare written reports four (4) times each year during the term hereof which shall describe progress in meeting the annual goals set out in section 28-55. Copies of such reports shall be provided to the manager, council and the mayor according to the follow schedule:

Period covered	*Date Due*
January 1-March 31	April 20
April 1-June 30	July 20
July 1-September 30	October 20
October 1-December 31	January 20

In addition, the quarterly report shall encompass the implementation of this division as well as a project by project report and justification of individual MBE and WBE goals by project. In calculating total amounts expended for such reports, all funds annually paid to MBEs and WBEs on city contracts shall be counted whether or not funds were used to accomplish project goals as the time of bid opening or proposal receipt.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-78. Explanation of failure to achieve annual goal.

If the director fails to meet the annual goal in section 28-55 in any year during the term hereof, then by January thirty-first of the following year, he shall submit to the mayor and council a report stating the reasons why the goals were not met and advising and recommending what should be done to assist him in meeting such goals in the future.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-79. Contracts excepted from this division.

In the case of a contract hereunder for which a part of the contract price is to be paid with funds from the United States Government and for which the United States Government has made applicable to such contract requirements, terms or conditions which are inconsistent with the terms of this division, the provisions of this division shall not apply to such contract to the extent of such inconsistency.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-80. Rules and regulations; informal guidelines.

The manager and director shall each have the power and authority and may each adopt rules and regulations and/or informal guidelines to effectuate the purpose and operation of this division, including by way of example but not by way of limitation the determination of qualification of a business enterprise; the composition of the

goals committees and/or the procedure for inquiries, studies and/or hearings with respect to the establishment of annual and individual contract goals hereunder; the determination of good-faith criteria and efforts with respect to meeting of contract goals, including the provisions of sections 28-57 through 28-64; the definition of aspects of commercially useful function and/or broker or conduit activity, including but not limited to supervision and control, regular employment, augmentation of work force, equipment, materials, suppliers and trucking operations and the sanctions therefore as set out in sections 28-70 through 28-72; the procedures, methods and criteria of certification of MBEs and WBEs as set out in section 28-73, including but not limited to: questions of procedures and methods of certification, questions of ownership, management and control, evidence of discrimination, continued eligibility and renewal of certification, interviews, complaints, investigations and onsite visits, burden of proof, length of period of certification, denial or granting of certification, suspension and/or revocation of certification and graduation criteria.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-81. Review.

Any person or entity who is the subject of and is directly and adversely affected by a determination of the manager or director on behalf of the city under this division pursuant to and by authority of the manager or director may seek review of such decision pursuant to the procedures set out in section 56-106 or section 28-33 of

this Code, as applicable. This section shall not be construed to create a right of standing that does not otherwise exist under Colorado law.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-82. Expiration of division.

This division shall become effective on the date of final publication and shall expire August 31, 1995.

(Ord. No. 513-90, § 2, 9-4-90)

Secs. 28-83 – 28-90. Reserved.

APPENDIX D

Constitution of the United States, Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

42 U.S.C. § 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to know others.

APPENDIX F

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX G

Colorado Constitution, Section 25:

> **Due Process of Law**. No person shall be deprived of life, liberty or property, without due process of law.

APPENDIX H

Colorado Constitution, Section 29:

> **Equality of the Sexes.** Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex.

APPENDIX I

Denver, Co., Charter, ch. A, art. II, § A2.3-1(1) (1982):

> All construction, reconstruction or remodeling of general public improvements not performed by the department, or with the permission of the manager and to the extent and in the manner provided by ordinance by a person, firm, or corporation entirely at his, their, or its expense, shall be performed under contracts let by the department without any action of the council except in the passage of the original ordinance authorizing the improvements or contracts. All such contracts shall be let to the lowest, responsive, qualified bidder, after public advertisement for not less than three (3) publication days, exclusive of Sundays and holidays, in the official newspaper. The right to reject any or all bids is reserved. No such contract shall be made without a bond for its faithful performance, with sufficient surety or sureties. No other surety than a surety company approved by the manager and mayor shall be accepted. Any other mode of letting such contracts shall be illegal and void.

APPENDIX J

EXHIBIT I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92-F-21

CONCRETE WORKS OF COLORADO, INC.,
a Colorado corporation,

Plaintiff,

vs.

THE CITY AND COUNTY OF DENVER, COLORADO,
a Municipal corporation,

Defendant,

AFFIDAVIT OF ALEXIS HOLDMAN

ALEXIS HOLDMAN, being duly sworn, deposes and says that:

1. I am the Director of the Office of Contract Compliance ("OCC"), the City and County of Denver ("City"). As such, I am responsible to the Mayor for the performance of the functions, powers and duties assigned to the OCC by Ordinance 513, Article III, Chapter 28 of the Denver Revised Municipal Code, entitled "Non-discrimination in City Contracts" (the "Ordinance"), subject to and consistent with the provisions of the Charter and ordinances of the City.

2. The Ordinance does not require, and the City does not set, goals for MBE or WBE selection as prime contractors. It is not applied to the selection of prime

contractors by the City, except as to the usage of MBE and WBE subcontractors by such prime contractors when such MBEs or WBEs are the lowest qualified bidder. Under Section 28-58 of the Ordinance, a prime contractor that does not meet project goals for MBE or WBE subcontractors, if any, assigned to a project, must demonstrate that it has made good faith efforts to do so in order to be a responsive bidder. It is the policy of the City to apply the good faith efforts requirements equally to all bidders, including MBEs, WBEs, white males and non-certified woman and minority contractors.

3. There is no material difference in the administrative burden, including costs, incurred under the Ordinance in showing good faith, whether the contractor is an MBE, WBE, white male or a non-certified woman or minority contractor. This is true even if an MBE, for example, performs a portion of the contract sufficient to meet the MBE goal without subcontracting to other MBEs. Such an MBE still incurs the same advertising cost (a single ad is run for both MBE and WBE participation, and even an MBE must run an ad for WBE participation and vice versa), is still required to send letters to all appropriate WBEs, still has to verify its attempts to contract with WBEs and give WBEs access to and adequate time to review all plans, drawings and specifications necessary to prepare bids. Moreover, such an MBE would often go through the exact same process with respect to other MBEs, either to subcontract or to protect itself from error. Thus, there is no material advantage to MBEs or WBEs under the Ordinance with respect to administrative burden or costs.

4. Section 28-58(9) requires that, in showing good faith efforts, a bidder verify that MBEs or WBEs were rejected because they did not submit the lowest bid or they were not qualified. In applying that provision, it is the policy of the City to consider all explanations offered for the rejection of MBEs or WBEs, including nonmonetary differences among the bids. Thus, for example, the City takes into account the fact that one subcontractor disclaimed responsibility for delay damages while another did not, or that one could perform within an acceptable time period while another could not.

5. In its Complaint, CWC alleges that it lost 3 contracts due to its failure to comply with the alleged "preference requirements" of the Ordinance. An examination of the record shows the following:

a. Project No. W75-103A, Lakewood & Dry Gulch Storm Drainage Improvements – Phase I. As stated in a Memorandum dated October 28, 1991, CWC's bid was rejected because it failed to comply with six of the ten good faith initiatives, including those numbered 3, 4, 6, 7, 9 and 10, and not because of any preference to an MBE or WBE. A similar bid by an MBE, WBE or noncertified woman or minority contractor would also have been rejected.

b. Project No. 91-205, Colorado Boulevard Median Improvements. As stated in a Memorandum dated October 22, 1991, CWC's bid was rejected because it failed to meet seven of the ten good faith initiatives, including those numbered 2, 3, 4, 6, 7, 9 and 10, and not because of any preference to an MBE or WBE. A similar

bid by an MBE, WBE or non-certified woman or minority contractor would also have been rejected.

c. Project No. 89-396B1, B4 and B7, Sixth and Josephine Improvements. As stated in a Memorandum dated February 7, 1991, CWC's bid was rejected because it failed to meet nine of the ten good faith initiatives, including those numbered 1, 2, 3, 4, 5, 6, 7, 8 and 9, and not because of any preference to an MBE or WBE. A similar bid by an MBE, WBE or non-certified woman or minority contractor would also have been rejected.

6. The Ordinance creates and the OCC grants no quota or preference for MBEs or WBEs. Under the Ordinance, no contract is required to be awarded to MBEs or WBEs either by the City or by any contractor unless the MBE or WBE is the lowest qualified bidder. In making that determination as well as the good faith efforts determination, there is no preference, quota or set aside whatsoever given to MBEs or WBEs.

7. OCC implements the Ordinance as written. There is no hidden intent to create any racial or gender preference. The Ordinance is implemented so as to ensure nondiscrimination in City contracting, and if no discrimination is found under the terms of the Ordinance (by showing good faith efforts to meet assigned goals, if any) then the contract will be awarded to the lowest qualified bidder without any utilization of minority or woman contractors.

8. Section 28-73(c) provides a rebuttable presumption that minority and women contractors who conducted or attempted to conduct business in the City prior to June 1, 1990 were the victims of past discrimination. This is a

presumption only, and upon proof to the contrary this presumption may be rebutted. The City currently has more than 400 companies certified as MBEs or WBEs, and has produced to Plaintiff in this litigation 433 discrimination statements. Plaintiff has identified 4 such statements showing that applicants were certified in spite of checking a box on a form indicating they were not actually aware of any such discrimination against them. It is not the City's policy to certify applicants where the presumption is rebutted, and a full investigation into the underlying circumstances of each application is necessary to determine whether an error may have been committed or whether other relevant circumstances exist, such as a stated fear of retaliation against the applicant. It is not the intent of OCC or Denver to certify individuals who do not meet the requirements of the Ordinance.

9. To the best of my knowledge and belief, neither Gracon Corporation nor Gerald R. Ashbach has ever submitted a good faith efforts statement to the City under the Ordinance.

11. Lists of prime contractors who have purchased plans from the City are not readily available to subcontractors. Although they may be obtained upon request from the Office of Contract Administration, this fact is not known to all subcontractors, and the lists are not generally distributed at pre-bid conferences or otherwise. In any event, such lists do not contain prime contractors who purchase plans from architects.

12. Every solicitation contains general requirements for responsiveness which a potential bidder must take into account. If a potential bidder does not make the

business decision to bid on the contract within sufficient time to meet such requirements, its bid will not be responsive. For example, a potential bidder must prequalify 7 days prior to bid opening, and must advertise 15 days prior to bid opening. The failure of a prime contractor to meet universally applicable bid requirements because of his individual business problems, such as bonding, scheduling or similar matters, is not deemed an adequate excuse for failure to meet the responsiveness requirements arising under the Ordinance or otherwise.

13. Good faith efforts are often accepted by the City, and it is certainly not the policy or practice of the City to tell contractors that contracts will be awarded only if goals are met. On many projects, 0% MBE and 0% WBE are assigned from the outset. For example, in 1991, 18 of 75 construction projects had 0% MBE and 0% WBE goals assigned. Further, goals were met in 1990 on only 16 of 48 construction contracts awarded (33%). In 1991, goals were met on only 47 of 75 construction contracts awarded (63%). Overall, only 12.4% MBE utilization and 5.9% WBE utilization was attained on City construction contracts in 1991, in spite of annual goals of 16% and 12%, respectively. As these numbers show, the Ordinance does not in any manner operate as a quota or set-aside.

14. CWC has alleged that Mayor Webb refused to sign the contract for the construction of Concourse B at the new Denver International Airport, for approximately $106,000,000, "even after the Office of Contract Compliance had determined that the bidder had made a good faith effort." In fact, that contract was signed with M.A. Mortenson Co. by William Smith as Acting Mayor on December 27, 1991, on the basis of good faith efforts and

the MBE/WBE participation shown at the time of bid opening, without change. The Notice to Proceed was given on January 8, 1992.

15. Hensel Phelps Construction Co. was awarded the $41,400,000 contract for the construction of Concourse C at the new Denver International Airport in 1991 on the basis of good faith efforts, even though it did not meet the goals assigned to the project.

16. PCL Construction Services, Inc. was awarded the $27,300,000 contract for the construction of Concourse C core structures at the new Denver International Airport in 1991 on the basis of good faith efforts, even though it did not meet the goals assigned to the project.

18. In Project No. 85-112A, CWC was the second low bidder, failed to meet the assigned project goals, and was awarded the contract on the basis of good faith efforts because the low bidder failed to comply with the applicable ordinance either by meeting project goals or by showing good faith efforts to do so.

Futher Affiant sayeth not.

/s/ Alexis Holdman
Alexis Holdman

STATE OF COLORADO)
) ss:
CITY AND COUNTY OF DENVER)

Subscribed and sworn to before me this 26th day of October, 1992.

WITNESS MY HAND AND OFFICIAL SEAL.

My Commission expires: 6-3-95

/s/ Raymond D. McCall
Notary Public

No. 93-1095

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CONCRETE WORKS OF COLORADO, INC.,
a Colorado corporation,
Appellant

- v -

THE CITY AND COUNTY OF DENVER, COLORADO,
a municipal corporation,
Appellee.

ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, INC.
Amicus Curiae

On Appeal from the United States District Court
for the District of Colorado

BRIEF OF COLORADO BUILDING INDUSTRY COALITION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

INMAN FLYNN & BIESTERFELD, P.C.
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STATEMENT OF ISSUE

Whether the District Court properly entered summary judgment in favor of Appellee, the City and County of Denver.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CONCRETE WORKS OF COLORADO, INC., a Colorado corporation, Plaintiff-Appellant, v. DENVER, CITY AND COUNTY OF, a municipal corporation Defendant-Appellee, COLORADO BUILDING INDUSTRY COALITION, *Amicus Curiae.*	)	No. 93-1095

AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEE

Pursuant to the Motion granted by this Court on September 16, 1993, the Colorado Building Industry Coalition (hereinafter "CBIC") submits this Brief *Amicus Curiae* in Support of Appellee, City and County of Denver (hereinafter "Denver"). The Hispanic Contractors of Colorado, whose Motion was similarly granted by the Court on September 16, 1993, joins CBIC in this brief.

STATEMENT

This appeal comes to the United States Tenth Circuit Court of Appeals from a decision by the United States District Court for the District of Colorado ("the District Court"), granting summary judgment in favor of Denver, and sustaining the constitutionality of Denver City and County Ordinance No. 513, Series of 1990 (hereinafter "Ordinance"). Denver, Co., Rev. Mun. Code ch. 28, art. III (1982). The Ordinance aims to prevent discrimination against minority and women owned business enterprises on city-funded construction, reconstruction and remodeling projects. The Honorable Sherman G. Finesilver correctly found that the Ordinance "does not establish a quota," and "establishes, at most, nonbinding, good-faith aspirational goals to encourage participation of minority subcontractors in public works projects funded by the City of Denver." Aplt. App. at 28-29. After carefully scrutinizing the Ordinance, the District Court property [sic] determined that:

> It is not a racial preference, quota or even a variable set-aside; it is merely a vehicle to encourage nondiscrimination in the awarding of contracts. No minority or woman is preferred for a contract on the basis of being a minority or woman. . . .

Aplt. App. at 43. CBIC and its members support the Ordinance as a means of preventing discrimination on Denver construction projects.

CBIC is comprised of the Associated General Contractors of Colorado Building Chapter ("AGC of Colorado"), Hispanic Contractors of Colorado, African-American Construction Council, Minority Association of

Contractors, Women Construction Owners and Executives and the Colorado Black Contractor's Alliance. CBIC's members, particularly the AGC of Colorado, construct the vast majority of the public and commercial building projects in Denver.

ARGUMENT

I. The Brief of Associated General Contractors of America, Inc. as Amicus Curiae in Support of Appellant Does Not Represent the Views of CBIC.

The Brief of Associated General Contractors of America, Inc. as Amicus Curiae in Support of Appellant, Concrete Works of Colorado, Inc., does not represent the views of CBIC, which includes the AGC of Colorado, in this matter. Associated General Contractors of America, Inc. (hereinafter "AGC of America") neither consulted with, nor received acquiescence from the AGC of Colorado before filing its Amicus Brief supporting Appellant. CBIC disagrees with the partisan position set forth by AGC of America in its Amicus Brief.

Unlike CBIC, the AGC of America lacks personal knowledge of construction contracting by Denver, or in the local construction industry. The AGC of Colorado's opposition to the AGC of America's Amicus Brief was clearly communicated to AGC of America by letter dated September 3, 1993. (A copy of this letter is attached as Exhibit A hereto and incorporated herein by this reference.)

II. Summary Judgment in Favor of Denver Was Proper Because Denver Was Entitled to Judgment as a Matter of Law.

If strict scrutiny rather than the rational relationship standard of review is found to apply to the Ordinance, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), requires that the Ordinance be supported by a compelling governmental interest and that it be narrowly tailored. To establish a compelling governmental interest, a municipality should have a strong basis in evidence for its conclusion that remedial action is necessary. *Id.*, 488 U.S. at 500. Evidence "approaching a prima facie case" of discrimination either by the municipality or in the local construction industry is sufficient. *Id. See also Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

Denver had a strong basis for enacting the Ordinance. Denver produced statistical and anecdotal evidence of under-utilization of minority and women owned businesses both in its own contracting and in the local construction industry. Aplt. App. at 29, and 72-73; Appellee's Brief at 18-31. CBIC, including the AGC of Colorado, agrees that such under-utilization exists on Denver projects and in the local construction industry.

Concrete Works of Colorado had the burden of proving, as a matter of law, the unconstitutionality of the Ordinance. *Cunico v. Pueblo School Dist. No. 60*, 917 F.2d 431, 436 (10th Cir. 1990); *Wygant v. Jackson Board of Education*, 476 U.S. at 277-78; *Conlin v. Blanchard*, 745 F. Supp. 413, 421 (E.D. Mich. 1990), *aff'd*, 947 F.2d 944 (6th Cir. 1991); *Associated General Contractors of Connecticut v. City of New Haven*, 791 F. Supp. 941 (D. Conn. 1992). The

record on appeal amply illustrates the lack of a genuine issue of material fact sufficient to have withstood the entry of summary judgment in favor of Denver. Denver demonstrated, as a matter of law, both that it had a compelling governmental interest in enacting the Ordinance, and that the Ordinance is narrowly tailored.

CBIC has reviewed Appellee's Brief and adopts the factual statements and legal arguments contained therein. For the reasons set forth in Appellee's Brief, and in The Honorable Sherman G. Finesilver's Order Regarding Motion for Summary Judgment, Denver was entitled to judgment as a matter of law. The District Court correctly concluded that the Ordinance "is a constitutionally permissible exercise of the legislative power by Denver" and that "it is not constitutionally infirm in any respect." Aplt. App. at 82.

Conclusion

The Order Regarding Motion for Summary Judgment should be affirmed.

Respectfully submitted this 27th day of September, 1993.

INMAN FLYNN & BIESTERFELD, P.C.

/s/ Michael J. Glade
Michael J. Glade
1660 Lincoln Street, Suite 1700
Denver, Colorado 80264
(303) 861-5300
Attorneys for Amicus Curiae,
Colorado Building
Industry Coalition

CERTIFICATE OF MAILING

I do hereby certify that a true and correct copy of the foregoing AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEE was placed in the United States Mail, postage prepaid this 27th day of September, 1993, addressed to the following:

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/s/ Debra S. Sikes

EXHIBIT A

(LOGO)

ASSOCIATED GENERAL CONTRACTORS OF COLORADO

600 South Cherry Street, Suite 600 •
Denver, Colorado 80222 • (303) 388-2422

September 3, 1993

Hubert Beatty
AGC of America
1957 "E" Street NW
Washington, DC 20006

RE: AGC of America Amicus Brief in Colorado Concrete Works Case

Dear Bert:

On Friday, August 20, 1993, the President of the Hispanic Contractors of Colorado called to inquire why we were filing an Amicus Brief in the above referenced case. Based upon the results of a series of meetings between the AGC of Colorado and the organizations representing businesses from the minority and women owned construction industry, there was an agreement by both sides to take a "hands off" position in this case.

In June 1992, the AGC of Colorado met with representatives of the Hispanic Contractors of Colorado, the Afro American Construction Council, the Minority Association of Contractors, the Asian and American Indian Chamber of Commerce, the League of United Latin American Citizens, the Women Construction Owners and Executives, and the Colorado Black Contractors Alliance to discuss

the suit which had at that time just been filed by Colorado Concrete Works against the City and County of Denver to challenge the City's MBE/WBE ordinance. The City of Denver had contacted the Hispanic Contractors of Colorado and other minority construction associations, to ask that they enter as interested parties in the trial of the Colorado Concrete Works lawsuit. Because of a long-standing formal liaison between the Hispanic Contractors of Colorado and the AGC of Colorado Building Chapter, the HCC requested a meeting to discuss with AGC the City's request before agreeing to become a party to the lawsuit.

At that meeting in June, 1992 (at which AGC of America President Marvin Black was present) AGC asked that the Hispanic Contractors of Colorado and other minority associations decline the City's invitation to join the litigation. We in turn promised that we would in no way support the litigation, our theory being that both parties were adequately represented by counsel and had adequate funding to proceed with the litigation. Subsequent to that June meeting, the HCC did in fact decline to enter the litigation even though the City of Denver continued to encourage them to become involved.

We continued to meet at least monthly with the HCC and other minority groups in an attempt to address the disparity of use of minority firms in Colorado building construction through the activities of a voluntary coalition rather than through publicly mandated goals, quotas, or other involuntary externally imposed solutions.

We took this cooperative effort to its outer limits in May of 1993 by conducting a partnering session professionally

facilitated by Norma Barr from Austin, Texas. At that session, most of the above referenced minority groups and the AGC of Colorado were represented by a minimum of three representatives each. Those representatives committed to forming the Colorado Building Industry Coalition, a multi-racial, multi-ethnic, all gender group which agreed that there is indeed disparity in minority and women utilization in the Colorado construction industry. We further agreed, by a specific set of goals, to attempt to eliminate that disparity by voluntary cooperation and by the creation of programs designed to bring into the mainstream construction industry representatives of all segments of Colorado society.

Throughout the time of working with all of these groups, one of the primary symbols of good faith on the part of all parties was the continued "hands off" position in the Colorado Concrete Works litigation. This applied to both sides, not just AGC.

Based on all of this background, it came as a shock to HCC's President Beruman, who also is a member of our chapter, when he was apprised by the City Attorney and the Mayor's Office of Contract Compliance that AGC was "talking from both sides of its mouth" by having promised to stay out of the litigation and by then filing an Amicus Brief. In the last two weeks I have been contacted by representatives of the HCC, the Afro American Construction Council, and the Minority Association of Contractors asking why we went back on our word to remain neutral in the Colorado Concrete Works litigation. In spite of my best efforts to explain to these individuals that the AGC of America and the AGC of Colorado are separate entities who answer to different leadership, I

find it virtually impossible to explain adequately to them that we send $60,000 or $70,000 per year to an organization who would enter a lawsuit under the name of AGC in our city without our prior approval. I can't answer that question to my own satisfaction, let alone theirs.

Since we promised in good faith that AGC would not involve itself in the Colorado Concrete Works litigation, and since I cannot successfully argue that the AGC of America and AGC of Colorado are two completely separate and distinct organizations, the only way in which I can honor the commitment we made in June of 1992 is to ask that the AGC of America withdraw its Amicus Brief in the Colorado Concrete Works case and disavow all interest in the case. I am specifically making that request of you by this communication.

In support of this request I reiterate that both parties in the Colorado Concrete Works case are (and were at the trial) adequately represented by counsel who understand the law of Colorado and the United States. I respectfully submit that neither Brad Reynolds nor any other counsel who has never set foot in the State of Colorado understands all the dynamics of this case any better than local counsel. I therefore doubt that AGC of America's Amicus Brief can or will add anything legally substantial to this appeal. It can only serve to damage the credibility of the AGC of Colorado.

Our chapter and its credibility have been severely tarnished and our efforts at cooperative resolution of a serious problem have been severely set back by the AGC of America's action in filing this Amicus Brief over the objection of the City and County of Denver and without

our prior knowledge. I urge you in the strongest possible terms to implement procedures at the AGC of America to assure that any chapter be consulted before the AGC of America gets involved in litigation which might affect the activities of that chapter in its local jurisdiction.

I await your response regarding our request that you withdraw from this case and regret that this action is necessary at all.

Sincerely,

/s/ Dick O'Brecht
Dick O'Brecht
Executive Director

On behalf of the AGC of Colorado Officers and Directors.

cc: Mayor Wellington Webb,
City & County of Denver

City Attorney,
City & County of Denver

José Beruman, President
Hispanic Contractors of Colorado

Walter Jones,
Afro American Construction Council

Rosemary Breiner
Colorado Chapter National Women Construction Owners & Executives

Jim Walker,
Minority Association of Contractors

AGC of Colorado
Executive Committee Members